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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

**MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,**

vs.

ELMORE & STAHL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

**PETITION FOR CERTIORARI FILED JULY 19, 1963
CERTIORARI GRANTED OCTOBER 14, 1963**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

ELMORE & STAHL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Cameron County, Texas

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[fol. A]

**IN THE 107TH JUDICIAL DISTRICT COURT
OF CAMERON COUNTY, TEXAS**

No. 37410-A

ELMORE AND STAHL

vs.

MISSOURI PACIFIC RAILROAD COMPANY

PLAINTIFF'S ORIGINAL PETITION—Filed September 28, 1959

To the Honorable Judge of Said Court:

Now comes Elmore and Stahl, plaintiff, complaining of Missouri Pacific Railroad Company, a common carrier with an office and place of business in Cameron County, Texas, hereinafter called defendant carrier, and for cause of action, plaintiff alleges:

Count I.

1. That on or about June 12, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates of Honeydew Melons in good and marketable condition, loaded in Car ART 35042 and ultimately consigned to LaMantia Bros. Arrigo Company at Chicago, Illinois, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been properly carried and promptly delivered to consignee at Chicago, Illinois, it would have been then and there of the market value of \$2240.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the [fol. B] market value of only \$1423.75 to plaintiff's damage in the sum of \$816.25, with interest thereon from June 18, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count II.

That on or about June 1, 1958, plaintiff delivered to defendant carrier at Rio Grande, Texas, 640 Crates of Honeydew Melons in good and marketable condition, loaded in Car ART 33450 and ultimately consigned to York & Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been properly carried and promptly delivered to consignee at Boston, Massachusetts, it would have been then and there of the market value of \$3264.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$2736.25 to plaintiff's damage in the sum of \$527.75, with interest thereon from June 8, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count III.

That on or about June 16, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 560 crates Honeydew Melons in good and marketable condition, loaded in Car ART 51395 and ultimately consigned to York & Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

[fol. C] That had said produce been properly carried and promptly delivered to consignee at Boston, Massachusetts, it would have been then and there of the market value of \$1680.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$1063.90 to plaintiff's damage in the sum of \$616.00, with interest thereon from June 25, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count IV.

That on or about June 21, 1958, plaintiff delivered to defendant carrier at Pharr, Texas, 700 Baskets of Peppers in good and marketable condition, loaded in Car ART 52223 and ultimately consigned to Catio & Mascari at Indianapolis, Indiana for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been properly carried and promptly delivered to consignee at Indianapolis, Ind., it would have been then and there of the market value of \$2800.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$1901.45 to plaintiff's damage in the sum of \$898.55, with interest thereon from June 26, 1958, until paid, at the rate of Six (6%) per centum per annum.

That within less than Nine (9) months after delivery of said produce to defendant carrier, plaintiff filed its claim in writing with defendant carrier for the loss and damage [fol. D] resulting to and suffered by plaintiff, as aforesaid, but defendant carrier has, notwithstanding, wholly failed and refused to pay the damages claimed.

Wherefore, plaintiff prays that it have judgment for its damages, with interest thereon from the dates set forth, for costs of suit, and for such other and further relief as to the Court may seem just.

North, Blackmon & White, By Jack E. A. White, 418
N. Tancahua, Corpus Christi, Texas, Attorneys for
Plaintiff.

[File endorsement omitted]

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[fol. E]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER—

Filed September 20, 1960

To the Honorable Judge of Said Court:

Now Comes Missouri Pacific Railroad Company, Defendant in the above entitled and numbered cause and files this, its First Amended Original Answer and respectfully shows the following:

I

Defendant specially excepts to Plaintiff's Petition, and particularly to Count I, Paragraph 2; Count II, Paragraph 2; Count III, Paragraph 2 and Count IV, Paragraph 2 for the following reasons:

A) The words "properly carried" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect the shipment was not properly carried. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and prepare its defense herein.

B) The words "promptly delivered" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect the shipment was not properly delivered. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and [fol. F] prepare its defense herein.

C) The words "poor condition" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect

5

the shipment was in such condition. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and prepare its defense herein.

Of each and all the above and foregoing exceptions Defendant prays judgment of the Court.

II

Subject to the foregoing pleas, Defendant denies all and singular the material allegations in Plaintiff's Petition contained, and says the same are not true in whole or in part; and of this it puts itself upon the country.

III

Again comes Defendant, and for further answer herein, subject to the above and foregoing pleas and in the event such answer is necessary, would respectfully show as to each count of Plaintiff's Petition:

1) That the damage, if any, in whole or in part, to said commodities upon arrival at final destination and at the time of delivery to the consignee, was the result of the nature of said commodities and the inherent vice thereof, to wit: they are of a perishable nature, and said Defendant is not liable therefor.

2) That the damage, if any, in whole or in part, to said commodities upon arrival at final destination and at the time of delivery to the consignee, was the direct result of acts or omissions of Plaintiff, or the servants and agents of [fol. G] Plaintiff, for which Defendant is not liable.

3) That Defendant furnished the carriage and such services for the protection of said commodities as Plaintiff requested under the terms of the bill of lading and any diversions or changes of orders filed by Plaintiff or Plaintiff's servants or agents with the agents of Defendant, in the usual time and manner and in a reasonable time and manner, and in accordance with the Perishable Protective Tariff applicable thereto, and fully discharge the duties and obligations incumbent upon Defendant by virtue thereof,

and is not liable for the damage, if any, in whole or in part, to said commodities.

Wherefore, premises considered, Defendant prays that Plaintiff take nothing by this suit and that Defendant go hence with its costs without day.

Missouri Pacific Railroad Company, Defendant,
Sharpe & Hardy, Its Attorneys, By: T. Gilbert
Sharpe, of Counsel.

[File endorsement omitted]

[fol. H]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—
Filed October 24, 1960

To the Honorable Judge of Said Court:

Now comes Elmore and Stahl, plaintiff, complaining of Missouri Pacific Railroad Company, a common carrier with an office and place of business in Cameron County, Texas, hereafter called defendant carrier, and files this their First Amended Original Petition, and for cause of action, plaintiff alleges:

Count I.

1. That on or about June 12, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates honeydew melons in good and marketable condition, loaded in Car ART 35042 and ultimately consigned to LaMantia Bros. Arrigo at Chicago, Illinois, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been delivered to consignee in good condition at Chicago, Illinois, it would have been then and there of the market value of \$2240.00, but it was delivered to consignee in bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1423.75 to plaintiff's damage in [fol. I] the sum of \$816.25, with interest thereon from June 18, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count II.

That on or about June 1, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates of honeydew melons in good and marketable condition, loaded in Car ART 33450 and ultimately consigned to York and Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been delivered to consignee in good condition at Boston, Massachusetts, it would have been then and there of the market value of \$3264.00, but it was delivered to consignee in a bruised, broken, and decayed condition, in which condition such produce was then and there of the market value of only \$2736.25 to plaintiff's damage in the sum of \$527.75, with interest thereon from June 9, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count III.

That on or about June 16, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 560 crates of honeydew melons in good and marketable condition, loaded in Car ART 51395 and ultimately consigned to York and Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

[fol. J] 2. That had said produce been delivered to consignee in good condition at Boston, Massachusetts, it would have been then and there of the market value of \$1680.00, but it was delivered to consignee in a bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1063.90 to plaintiff's damage in the sum of \$616.10, with interest thereon from June 25, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count IV.

That on or about June 21, 1958, plaintiff delivered to defendant carrier at Pharr, Texas, 700 baskets of peppers in good and marketable condition, loaded in Car ART 52223 and ultimately consigned to Catio and Mascari at Indianapolis, Indiana, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been delivered to consignee in good condition at Indianapolis, Indiana, it would have been then and there of the market value of \$2800.00, but it was delivered to consignee in a bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1901.45 to plaintiff's damage in the sum of \$898.55, with interest thereon from June 26, 1958, until paid, at the rate of Six (6%) per centum per annum.

That within less than Nine (9) months after delivery of said produce to defendant carrier, plaintiff filed its claims in writing with defendant carrier for the loss and damage resulting to and suffered by plaintiff, as aforesaid, but defendant carrier has, notwithstanding, wholly failed and refused to pay the damages claimed.

[fol. K] Wherefore, plaintiff prays that it have judgment for its damages, with interest thereon from the dates set forth, for costs of suit, and for such other and further relief as to the Court may seem just.

North, Blackmon & White, By: Jack E. A. White,
Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 1]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

ELMORE & STAHL

vs.

MISSOURI PACIFIC RAILROAD COMPANY

Statement of Facts.

APPEARANCES:

For the Plaintiff:

Messrs. North, Blackmon & White, Attorneys at Law,
419 North Tancahua Street, Corpus Christi, Texas, By:
Hon. Jack White, of counsel;

For the Defendant:

Messrs. Sharpe & Hardy, Attorneys at Law, P. O. Box
894, Brownsville, Texas, By: Hon. T. Gilbert Sharpe, of
counsel.

Be It Remembered that on the 27th day of March, A. D.
1961, et seq., the same being regular days of the January
Term of the 107th Judicial District Court of Cameron
County, Texas, there came on to be heard before the Hon-
orable Hawthorne Phillips, Judge of said Court, and a
jury, the above entitled and numbered cause;

Whereupon the following evidence, together with objec-
tions of counsel, replies, rulings, comments and exceptions
in connection therewith, was presented before said Court,
to-wit:

.

[fol. 2]

STIPULATION AS TO AND OFFERS IN EVIDENCE

Mr. White: It's stipulated that either party may offer into evidence papers from their files in each instance, including the bill of lading or copies of invoices, diversion orders, accounts of sale, inspection certificates at origin or destination, railroad running records, market reports, and— Anything else you can think of? —loading manifests.

Mr. Sharpe: Anything that relates to the actual handling of the shipment, from the standpoint of either the shipper or the railroad. The only thing I can think of, in some instances, our running or protective service records are in the form of telegraph. Now, Jack usually does this:—

Mr. White: Well, it's further stipulated that if the consignee were present in court that he would testify that the price received for the commodity was the market value [fol. 3] of the commodity in its condition and upon its arrival at destination.

Mr. Sharpe: Well, I think that gets it all right. Mr. White, of course, was not present last week; the only trouble we had on the stipulation there related to instruments which did not directly affect the shipment we had, such as comparison cars, letters, and I just wanted to get off on the right foot. We are not, on either side, agreeing to outside matters, but anything that does relate to these shipments, of course, will be admissible.

Mr. White: That is correct.

Mr. Sharpe: I think we have it straight, Your Honor.

The Court: The same stipulation that you had in effect last week?

Mr. Sharpe: Yes, sir; that we wound up with.

The Court: In other words, it would admit any statements of the agents or employees or representatives of either plaintiff or defendant, but not a third person?

Mr. Sharpe: That is correct.

[fol. 4] Mr. White: Your Honor, I'd like to call Mr. Fillpot on first. Before we begin the testimony, Your Honor, I'd like to put these documents into evidence under the stipulation.

The Court: All right.

Mr. White: On Count I, plaintiff offers the bill of lading; the diversion order; invoice showing the sale; the account of sales; the destination inspection certificate prepared by the United States Department of Agriculture; the Chicago Market Reports for the date of Monday, June 16, and Tuesday, June 17, 1958.

(Whereupon the instruments above referred to were marked for identification by the Court Reporter as follows: "Count I—Plaintiff's Exhibit Numbers 1 through 7.")

[fol. 6] Mr. Sharpe: There are a few pencil marks that need to be removed. Aside from that, we have no objection [fol. 7] to the papers on Count II. We have no objection, Your Honor, to any of these instruments. We do want the record to show that on Count IV we furnished the plaintiff the destination inspection.

Mr. White: Your Honor, I might suggest that it would shorten the record somewhat if we only entered the pertinent parts of these Government Market Reports that apply to this particular commodity.

Mr. Sharpe: Yes, I agree. There are so many items on there, and unless in that—I think in that instance, the pencil ought to be used—

The Court: I would suggest to counsel that they either circle the pertinent parts in pencil or in ink, the pertinent items on the Government Market Reports.

[fol. 8] JOHN FILLPOT, called as a witness by the plaintiff, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. White:

Q. Would you state your name, please, sir?

A. John Fillpot.

Q. Mr. Fillpot, what business are you in?

A. I am in the gassing and precooling business on fresh fruits and vegetables.

Q. Now, you will have to speak up so all these people on the jury can hear you. What does that consist of? Just what do you do? Kind of explain it, generally.

A. Well, we have a—it's ethylene gas that we use for coloring and ripening process on honeydew melons after they are packed and loaded in the cars ready to be shipped.

Q. And will you explain generally how you go about it?

A. Well, my job, I have nothing to do with the shipping end of it or anything like that, but my job is to check the melons as they are being packed each day on the shed, and after they are loaded into the car, and see that the melons are loaded in good shape and they are good melons. [fol. 9] It's to my advantage, the same as anybody else's, because I am doing the gassing on the melons and we have to possibly do two or three different processes to the melons in the car. We let them sit for four or five hours and the car is opened up and if they need another shot of gas, why, we gas them again and that process is—when that is completed we know they are ready to ship. And we check the melons and I know they are okay when they leave there. If not, it's my business to tell the shipper or whoever is in charge of the melons.

Q. Now, Mr. Fillpot, what is the name of the business that you work in?

A. Modern Precooling. I work for Modern Precooling Company.

Q. How long have you been in this particular business?

A. '37; about twenty-three years.

Q. Is this treatment used only on honeydew melons?

A. No; it's used— That is all that I work on, is honeydew melons, but this same gas is used for citrus and it's being used over the Valley, I suppose, on citrus here, and bananas and tomatoes and different commodities.

Q. How long has this process been in use in the industry? [fol. 10] A. Well, as I say, I started in 1937 and I just could not tell you that. I don't know how long it's been.

Q. And is this the usual and customary procedure used in shipping honeydew melons?

A. All over the country. I work from here to California; it's all over.

Q. Now, this particular lawsuit involves three carloads of honeydew melons shipped out of Rio Grande City in June of 1958; were you working in Rio Grande City at that time?

A. Yes, I was.

Q. Did you handle these particular three cars?

A. All of the gassing of the honeydews held there is under my supervision, yes.

Q. You didn't do all of it personally?

A. No, no, I have a boy that has been in the business, worked for the company the same time I did that works for me, or works with me.

Q. But you were in Rio Grande City at the time, were you not?

A. I was in Rio Grande City, yes, sir.

Q. And were you familiar with the condition and the quality of the melons being shipped at that time?

A. I certainly was, yes, sir.

Q. Were you also working for other shippers in that [fol. 11] area at the time, other than Elmore & Stahl?

A. Yes, sir, I was.

Q. Do you recall the general quality and condition of the melons being shipped by Elmore & Stahl during this particular period of time?

Mr. Sharpe: If the Court please, unless the predicate is first laid showing his qualifications in connection with those matters, we object to it.

The Court: All right, I believe the objection would be good. You may develop it.

By Mr. White:

Q. I believe you stated a minute ago that you did observe these melons while they were being brought in from the fields and run through the grader and packer?

A. That is right. I am on the shed several times a day and check the melons. I know the melons go into the cars most of the time, yes.

Q. And you observed them for--well, what are you looking for at the time?

A. Well, I know that they were sound melons and good, shipable melons.

Mr. Sharpe: Well, we move to strike the last portion of the answer as being unresponsive, Your Honor.

[fol. 12] The Court: I am going to overrule the objection.

By Mr. White:

Q. I am asking, particularly, what characteristics are you looking for in the melon, itself, that has regard to your service that you perform?

A. Well, we just look for a good, sound melon.

Mr. Sharpe: May it please the Court, the objection was sustained that the predicate had not been laid until this man was shown to be qualified or competent to testify as to quality, and so far, he hasn't done it; yet he continues to give conclusions which depend upon that predicate.

The Court: Or knows how to judge melons?

Mr. Sharpe: Yes, sir, quality, condition.

By Mr. White:

Q. Have you worked with honeydews very long?

A. Well, I have been in them—I have worked with them for twenty-three years and I'm sure that most any shipper—

Q. Well, during that time have you developed the knowledge that you can tell a good quality and condition honey-
[fol. 13] dew melon?

A. I certainly have.

Mr. Sharpe: I'd like to have him on voir dire, Your Honor.

The Court: All right, you may take him.

Voir Dire examination.

By Mr. Sharpe:

Q. Now, Mr. Fillpot, just what business are you connected with?

A. I am connected with gassing honeydew melons and precooling on cantaloupes.

Q. Well, what company are you connected with?

A. Modern Precooling Company.

Q. Now, that is not Elmore & Stahl, the plaintiff in this case?

A. No, that is not.

Q. You are not in the packing-shed business, are you?

A. No, sir.

Q. And you are not a grower of melons?

A. No, sir.

Q. You are not a farmer?

A. No, sir.

Q. Are you familiar with United States Department of [fol. 14] Agriculture Standards that determine what quality a honeydew melon is or isn't?

A. Well, I don't know just exactly what you mean there.

Q. Well, what experience— Have you ever studied horticulture?

A. No, I haven't.

Q. Or plant pathology?

A. No, sir.

Q. Do you know how to test a melon to determine if it is diseased or has decay in it?

A. I certainly do. I handle from 500 to 1500 cars a year and—

Q. Where did you get your training to determine whether or not a melon has decay in it?

A. On the packing sheds, with the melons.

Q. You mean you just picked it up in the trade?

A. I did.

Q. Did you ever study any books in connection with the matter?

A. I've got books, but I've— I have still got the experience. It's a lot better than out of the books.

Q. What books have you ever studied that would enable you to determine the quality of a honeydew melon?

A. I've studied books at the company that Carbide [fol. 15] Company puts out.

Q. Would you name some of these for us?

A. Beg pardon?

Q. Would you name some of those books for us?

A. No, I couldn't name them.

Q. Have you ever studied the United States Department of Agriculture Standards? Do you know what I'm talking about?

A. Yes, I do, but I haven't, no.

Mr. Sharpe: All right, we submit he's not qualified, Your Honor.

The Court: Overrule the objection.

Direct examination (Continued).

By Mr. White:

Q. Mr. Fillpot, you stated you have worked with honeydew melons and you have observed what it takes to classify a melon as a good quality melon, have you not?

A. I have. I know it.

Q. I believe you stated a while ago that when the melons come in from the field you are concerned with their degree of ripeness, are you not?

A. That is right.

Q. And their quality, as far as color?

A. Yes, sir.

[fol. 16] Q. And what effect, actually, is this gassing supposed to have?

A. The gassing is for a ripening and coloring process.

Q. What color is the honeydew melon when it's brought in to the shed?

A. The honeydew melon is picked when they are just hard, firm, and white. And the gas is supposed to color them, for appearance of the melons.

Q. And it's supposed to color and ripen it?

A. That is right.

Q. To the point that the shipper and—together with your knowledge and advice to the shipper the fact that those melons are then ready to ship; is that correct?

A. That is right.

Q. And that is the service that you have been performing for some twenty-three years for the shippers?

A. That is right. And they don't ship them without it.

Q. Now, you don't recall the melons in each of these particular cars, or do you? Do you have any recollection to show what—any recollection of each car in this lawsuit?

A. No, I don't have the records here. No.

Q. But do you recall from your own personal knowledge or recollection that you were present at the time these [fol. 17] were shipped?

A. At the time they were being loaded, yes.

Q. In other words, you were there on the shed and you saw them as they came in from the field?

A. That is right.

Q. And noted their condition and quality?

A. That is right.

Q. What would you say generally was their quality and condition at the time?

A. Well, they were good melons, a perfect melon, as far as I know, when they were loaded in Rio Grande City.

Q. Now, if they had been discolored in any way, what would have taken place then?

A. The melons discolored, to my knowledge, are not even loaded. I mean, they just don't load those melons.

Q. Are there enough melons there of good color and quality to take up all of the loading here?

A. That is right.

Q. Could you tell us what happens to the melons that might possibly have off color or decay or some other defect?

A. Well, I just don't know just how to explain that. The only thing I know is that all of those melons that show any decay or discolor are culled out. They are culls. They [fol. 18] are just not loaded. And what happens to the melon from there on, I just couldn't tell you.

Mr. White: Pass the witness.

Cross examination.

By Mr. Sharpe:

Q. Mr. Fillpot, where do you live?

A. Laredo, Texas.

Q. How long have you lived there?

A. Since '56.

Q. Where did you live before that?

A. Phoenix, Arizona.

Q. You say you had been in this gassing business for over twenty years?

A. That is right.

Q. How long did you live in Phoenix?

A. About twelve years.

Q. And where did you live before that?

A. Well, Saint Helena, California.

Q. Saint Helena?

A. Saint Helena.

Q. About how long?

A. Three years.

Q. And before that?

[fol. 19] A. A fruit tramp don't have no home.

Q. I beg your pardon?

A. I was born in Missouri. I was raised in Missouri.

Q. Well, you said you had been in this business something over twenty years; I was just trying to find out where you had practiced your vocation during that period of time, and you tell us it was— Did you ever do any gassing in Missouri?

A. No, sir.

Q. Where did you start this gassing business?

A. Imperial Valley, Brawley, California.

Q. Was that when you lived in Saint Helena?

A. No, sir.

Q. Where did you live?

A. Well, it was Brawley at the time. I was living there. This is seasonal work. We just have a home where the work is.

Q. Well, if I get it straight, did you still live in Missouri while you were doing the work out there?

A. No.

Q. Where did you live when you first started doing the gassing work in California?

A. I lived at Brawley, California.

Q. Brawley?

A. Yes, sir.

[fol. 20] Q. All right, sir. Well, Brawley and then Saint Helena and Phoenix, Arizona, and then Laredo, Texas— does that cover it pretty well; that is, the places you have lived since you have been in this business?

A. Yes.

Q. Now, are you the owner of the company with which you are associated?

A. I am not, no.

Q. What is the name of it?

A. Modern. Modern Precooling Company.

Q. Where is its main office?

A. In El Centro, California.

Q. Who is the owner of that company?

A. G. W. Baker.

Q. Is he here today?

A. No, he isn't. He's in California.

Q. Well, then, do you know whether that is an individually owned business or a partnership or corporation?

A. I think it's individually owned.

Q. You think Mr. Baker owns all of it?

A. Yes, sir.

Q. And how many years have you been connected with that particular company?

A. About seventeen years.

[fol. 21] Q. Now, what equipment is used in connection with the gassing of honeydew melons, Mr. Fillpot?

A. There is nothing, only just this ethylene gas that comes in tanks the same size as acetylene welding and we have a regulator that fits on this tank and just a rubber hose that goes into the car and we adjust the gas through this regulator.

Q. Does your company furnish the tanks?

A. Yes.

Q. And the hose?

A. And the hose.

Q. And I suppose you have some trucks to haul the gas and the tanks in, don't you?

A. That is right, we do.

Q. Well, in this particular case; that is, where this service was performed for Elmore & Stahl back in 1958, did your company furnish all of that equipment, or did Elmore & Stahl furnish any of it?

A. My company furnished it.

Q. All right. And your company is paid on some sort of a contract or piece basis, I suppose?

A. On the car basis, yes, sir.

Q. And do you recall whether 1958 was the first year that you had done any work for Elmore & Stahl?

A. No, we did work for them in '57.

[fol. 22] Q. You personally worked on the Elmore shed?

A. In Rio Grande City, yes.

Q. You were living in Laredo, Texas, in 1958, in June, when you were doing this work for Elmore & Stahl?

A. I was, yes, sir.

Q. Did you travel back and forth from your home in Laredo to Rio Grande City, or did you stay in Rio Grande City?

A. No, I was in Rio Grande City.

Q. For what period of time?

A. Well, during the season, possibly four or five weeks. I don't know just when.

Q. In May and June?

A. In May and part of June.

Q. Of 1958?

A. Yes.

Q. Now, you said a while ago that you had some other employee; I think you referred to him as a boy who was with you. Were you two the only employees of the Modern Precooling Company working in Rio Grande City?

A. Working in Rio Grande City, yes.

Q. In 1958?

A. Yes, sir.

[fol. 23] Q. What was this other man's name?

A. Robert Higdon.

Q. Where is this boy today?

A. He's in Turlock, California.

Q. All right Mr. Fillpot, now, you didn't see any of the honeydew melons that are involved in these shipments in this case during the time they were in the field, did you, when they were growing?

A. Yes, yes, I do.

Q. You did see them?

A. I go to the field occasionally and see the melons before they are picked.

Q. Well, sir, I mean in this particular case, can you positively testify that you saw the particular melons that are involved in these three car shipments?

A. No, no, sir, I cannot.

Q. And were you there when they were harvested and put in the truck?

A. I was there when— No; I was there when they were brought into the shed and dumped out of the trucks, to be packed.

Q. And after these honeydews are brought into the packing shed, they go through a processing operation there, do they not?

A. They do. They go over a sorting belt and into the [fol. 24] bins before they are packed.

Q. Well, they go into a brushing machine, don't they?

A. Yes.

Q. And they go onto a conveyor belt?

A. That is right.

Q. And then they are graded out as to size, aren't they?

A. Yes, sir, as to size.

Q. And put into a crate?

A. That is right.

Q. And do you remember, can you tell us what size crates were involved in these shipments that we have in this suit here?

A. No, I cannot. There's times that they are mixed. They have different sizes in the same car.

Q. What size crates have you worked with for Elmore & Stahl as far as honeydew melons are concerned?

A. Well, we worked with cartons and crates, too. They run from eights, nines and twelves.

Q. You say eights, nines and twelves. Let's tell the jury what you mean by that; the number of cantaloupes?

A. The number of honeydews in a crate.

Q. When you refer to eight, you mean you've got eight in that particular package, don't you?

[fol. 25] A. That is right.

Q. And nine, you've got nine; and twelve, twelve in a package?

A. Yes, sir, that is right.

Q. All right. Now, at the packing shed when these honeydews are unloaded, they are unloaded by hand, aren't they?

A. Unloaded by hand?

Q. They come into the shed in the truck and then they are unloaded or pushed out by the conveyor belt?

A. They are dumped, yes.

Q. After the honeydews go through the brushing machine and onto the conveyor belt, they are dropped into bins for grading purposes, aren't they?

A. They are not dumped; the belt runs right even with the conveyor belt.

Q. Well, you have several layers of honeydews in a bin, don't you?

A. No.

Q. You don't have but one layer of honeydews in a bin where they are being graded?

A. They may be piled up, but they don't throw them from the conveyor over and pile them up; they have two or three helpers there at the bin. When the melons pile up, they lay them over.

[fol. 26] Q. Well, sir, let's see what your testimony is. Let's say we've got a lot of honeydews coming down the conveyor belt in the packing shed up at this very place that you're talking about—Elmore & Stahl's packing shed in Rio Grande City—and they get to the place to where they've got to go over into the bins before they are packed; is it your testimony that there is just one layer of honeydews in that bin at the time, or is there more than one?

A. No, I didn't say there was—I said they had help in the bins that would lay the melons over; after they rolled down and filled up so far, they would pile them up.

Q. By "help," you mean hands in the packing shed?

A. In the bin.

Q. Yes, that help get the honeydew melons off the conveyor belt over in the bins?

A. No, no. I didn't say to get them off of the conveyor belt. They roll off the conveyor belt into the bin and then they are piled up afterwards.

Q. Well, they are piled up three and four layers high on occasions, aren't they?

A. Well, there are occasions they might, if they need the room, yes.

Q. All right. By hand?

[fol. 27] A. Yes.

Q. And after they get them into those bins, the employee has to take them out by hand and put them over in a crate, does he not?

A. That is the usual procedure, yes, sir.

Q. Yes, sir, by hand. And then after the crate is filled up, there is a little question of getting the lid on it, isn't there?

A. Well, it has to be lidded, yes.

Q. Yes. Well, have you observed them up at the Elmore & Stahl packing shed at Rio Grande City putting the lids on these crates of honeydews?

A. Yes, I have.

Q. How is it done—by hand or by machine?

A. It is done by machine, mostly.

Q. That is, the lid is pressed on by a machine?

A. Yes.

Q. And after the lid is put on the crate or carton of honeydews, why, then, it has to be carried out to the railroad car and put in a railroad car; is that correct?

A. That is right.

Q. And are you familiar with the way cantaloupes or honeydews are packed in a railroad car?

A. I have a good idea, after being around them twenty-
[fol. 28] three years.

Q. Yes, sir. Well, will you outline that now, starting at the place where the cartons or crates of honeydews are at the railroad car and tell us how they are placed inside of it and what is done to them prior to the time you do any of your gassing work?

A. Well, the melons go down the conveyor through the press; after the lid is on them, they are set off one by one.

Q. By hand?

A. By hand, on the floor, possibly six or seven high, and then they have hand trucks there that they truck them into the car, right back to the loader end. That is when it's loaded on out.

Q. Just go ahead; tell us, after the honeydews and the cartons or crates are put in there, what is done?

A. There isn't anything to tell. After they get the car loaded, they are loaded and braced out, and after they get through with them, that is when I take over.

Q. You say they are loaded and braced out; what do you mean by that?

A. There is a brace on all wood crates. They are loaded up to a certain point on each side and then they put eight [fol. 29] in there and spreaders.

Q. Now, Mr. Fillpot, you have told us you have been watching this for twenty-three years, haven't you?

A. Most of the time.

Q. Isn't that what you said?

A. Yes.

Q. Now, will you please tell us how these crates are put into the car and tell us how they are arranged, how many layers you have, how many braces are put on them; how are they put into that car to where it is filled up?

A. I'm not so sure whether that goes into my part of this deal or not. After all, as I told you when I started, I'm only working—I just have the gassing end of it and I have nothing to do with the loading, nothing to do with the bracing—nothing; just the gassing. That is my end of it. So that is more or less up to the shed foreman.

Q. You are waiting around to gas these melons after they are loaded?

A. I'm not waiting around. I have other jobs to do. I don't work for just Elmore & Stahl there; I do gassing for other people.

Q. The truth of the matter, Mr. Fillpot, is you are not concerned with these honeydew melons until they are put [fol. 30] in the car and loaded and ready for shipment; now, isn't that correct?

A. I didn't say I wasn't concerned with them. I had nothing to do with them until that time.

Q. Well, that is right. But you are willing to say they were in good, sound condition when you saw them inside the crates in a railroad car; that is your testimony, isn't it?

A. The melons that I work on, yes, sir, I am willing to say that.

Q. And as far as you can testify under oath to this jury, the first time you saw those melons is when they were loaded in the car right before you got ready to gas them; isn't that right?

A. No, that isn't right.

Q. All right, let's start right here at the beginning. Here's Count I of this case, Car ART 35042; do you have any recollection or any record telling us, first of all, how many crates or cartons of honeydews were in that car?

A. No, I don't. I told you, I have no records on the cars.

Q. All right. Now, tell us when you first saw those cartons of honeydews?

A. Which cartons are you talking about?

[fol. 31] Q. The ones that— This is a lawsuit, Mr. Fillpot, in which the plaintiff has described a shipment of honeydews in Car ART 35042, and what I'm asking you is this: When did you first see the cantaloupes or honeydews in that car? Can you tell us or not?

A. No, I can't. I have no record, I told you, whether—

Q. Well, I am asking you about your recollection, now. Do you remember seeing those cantaloupes in the car waiting for you to gas them?

A. On these particular cars?

Q. Yes, sir.

A. Well, I was in town. When I see the melons on the shed, I can't tell you just what car they are going into.

Mr. White: Your Honor, counsel is arguing with the witness. I think we brought that out in the beginning that Mr. Fillpot does not recall the cantaloupes in each particular shipment. My questioning of him was of a general nature, whether he was familiar generally, but he stated in the beginning that he has no knowledge of the particular cantaloupes in each particular car in this shipment.

Mr. Sharpe: In the light of counsel's statement, Your [fol. 32] Honor, we move to strike all of this witness' testimony in which he has referred to these melons as being in good and sound condition.

The Court: I believe it would go to the weight of the testimony, rather than the admissibility. I will overrule the objection.

By Mr. Sharpe:

Q. Now, Mr. Fillpot, you can't tell this jury under oath today that you ever saw a single one of these honeydews that you can identify, not guess about it or what somebody

told you; you can't tell this jury that you ever saw a single one of these honeydews until they were inside the railroad car and inside of a carton, can you?

A. I couldn't tell you for sure whether I saw any of those melons in any of those three cars or not.

Q. All right. Now, sir, you say that you are not in the packing-shed business, you are not concerned with selling honeydew melons, are you?

A. No, sir.

Q. What you are there to do or what you were there to do was to perform this gassing service and that was all?

A. That is right.

Q. Now, under whose supervision did you do that? Who [fol. 33] told you when to start and when to stop?

A. I am the representative in this district down here for the Modern Precooling; nobody tells me.

Q. You are the one that has the final say as to how much gas you will put in the cars?

A. That is right.

Q. And how long you will leave it on there?

A. That is right.

Q. And the temperatures in the car at the time that you put the gas in; is that right?

A. That is right.

Q. All right. Now, then, I'll ask you if it isn't true that you cannot put this gas into the car unless it's dry? You've got to put it into a car that has no ice in it; is that correct?

A. That is correct.

Q. So what you have is honeydews which have been brought in from the field, packed in the packing shed under the general process that we have outlined here, put in a railroad car and "braced," as you put it,—we'll develop a little later how it's done—and kept there without having been cooled at all for some period of time that you don't know about that's elapsed since they have been picked off the vine or cut off the vine and into the car. That is what [fol. 34] you have, melons during all that period of time which have not been under any kind of refrigeration; is that correct, sir?

A. That is correct.

Q. And when you put our gas into this car, you close all the doors and all the vents, don't you?

A. That is right.

Q. And what you are trying to do is to mature that honeydew, isn't it?

A. These honeydews have to be hot before the gas takes effect on them. If you don't have at least eighty to eighty-four pulp temperature, you are not getting the job done.

Q. And the reason for getting the gas there is to mature them and to change the color; is that right?

A. That is right.

Q. When those melons come into the packing shed, they are not at full maturity and they don't have a color that is attractive in appearance; isn't that correct?

A. That is correct, to a certain point. But you can't pick honey—if you picked honeydews on the vines till they were ready to ship, you couldn't ship them, I mean until they were ripe. They have to be picked when they are hard and firm.

[fol. 35] Q. So you have to pick them when they are green, don't you?

A. They don't pick them when they are green, hard and firm.

Q. But instead of leaving them on the vine to get mature and ripe; the gassing process does that very same thing; that is, makes them more mature after they are packed in the railroad car; isn't that correct?

A. You couldn't ship honeydew melons if you picked them on the vines when they were ripe.

Q. What I have said is correct; then, isn't it? The purpose of gassing them is to make the honeydew melons mature?

A. That is right.

Q. And in the process of this gassing, where this railroad car is closed up and where the temperature is whatever it is on a hot day in Rio Grande City, how long did you usually leave the gas in there?

A. From four to five hours.

Q. And during that period of time does it get pretty warm inside that car?

A. It does. That is the way we want it.

Q. Could you give us a statement of how hot it gets in there?

[fol. 36] A. No, I couldn't. I don't take no temperatures.

Q. Well, it could easily go to a hundred degrees or more, couldn't it?

A. It could.

Q. And after how many hours of gassing do you look at the melons?

A. We usually leave them closed up for about four hours and then we open the doors up, the vents, and air the melons out and give them a chance to see if they are coming around, are colored. If not, why, we close them up and give them another shot.

Q. All right, sir. You have just said you open the car after several hours to see if the melons were coming around to their color; is that what you said?

A. That is right.

Q. Now, what color are honeydew melons? What are they, ordinarily? You say you don't remember these, when they are put into the railroad car and what color do you expect them to be when you finish your gassing?

A. They are white. Just a white melon when they go into the cars and when we get through with them, we hope that they are all yellow. They are supposed to be yellow.

Q. They are white to start with and yellow when you [fol. 37] finish up with them?

A. Yes, sir.

Q. Well, now, Mr. Fillpot, think about that a little bit. Isn't the very object of putting gas in a car to take the green and the chlorophyll out of these honeydew melons?

A. We don't pack green melons.

Q. Green-colored melons?

A. Maybe the white melons, but not the green.

Q. Well, aren't they a greenish-white?

A. Well, it's possible you could find some of them, yes.

Q. Is it your testimony that these melons at Rio Grande City do not have any tint or degree of green in them when they are brought into the packing shed?

A. There are some of them that do, yes.

Q. Well, suppose you tell us, then, what is the object of this gassing process, in terms of changing the color? What color do you want to change them from to?

A. From white to a ripe color.

Q. To light color?

A. From white to a ripe color.

Q. To a ripe?

Mr. White: Ripe? R-i-p-e?

[fol. 38] The Witness: Yes.

By Mr. Sharpe:

Q. Is that what you mean by "ripe," is a yellow color?

A. That is right.

Q. Mr. Fillpot, I am going to have to ask you to go into a little bit more detail on these colors, now. Do you say that a honeydew melon in a railroad car, under the conditions that you have described up at Rio Grande City at the time they are to be shipped, should be yellow?

A. At the time they are to leave there, you mean?

Q. Yes.

A. Well; a cream color, yes.

Q. Well, now, do you make a distinction between a cream color and a yellow color?

A. Well, they are about the same, I guess.

Q. Well, now, are you the man that determines when the car of honeydews gets ready to leave up there what color these melons should be?

A. I am.

Q. Are you the man that determines that?

A. I am the man, yes, sir.

Q. All right, sir. What color do you want them to be when they are ready to be shipped out?

A. A ripe color. There is a difference between a green [fol. 39] melon and a ripe melon.

Q. All right. A ripe melon is what, now?

A. It's a cream color.

Q. A what?

A. A cream color.

Q. It's not yellow?

A. Well, either one you want to take; it doesn't make any difference.

Q. Cream or yellow? You can't be more specific about that?

A. (No answer.)

Q. Do you have any idea what the seller of those melons wants them to look like when they get up to—wherever this one went to—Chicago, what color he wants them to be?

A. I know a lot of those brokers up there.

Q. What do they want?

A. They want a ripe color.

Q. Would that be cream or yellow?

A. It would be a cream. I don't know what you call it.

Q. Is there any other desirable color when they get up to Chicago and want to sell them?

A. Not that I know of.

Q. Now, if, after you first close up the railroad car and gas these melons for several hours and you open up the [fol. 40] doors and look at them, the melons haven't changed their color sufficiently, you give them some more gas, don't you?

A. We can't tell when we first open the door. It doesn't make any difference how much gas you give them; if you don't open the doors and air them out, you won't get any color. We determine that after we open the doors and let them air out.

Q. Can you tell us something that would throw some light on these cars in Count I—

A. I have no record on these cars. I send the records all in to the company and I don't keep them, myself. I have no way—I can get all of them, yes, but I have no records now or with me.

Q. You couldn't tell us on Count I whether that car was gassed four hours or eight hours or twenty-four hours, could you?

A. Well, no, not till I saw the records, that is right.

Mr. Sharpe: Didn't you have a record on one of them?

Mr. White: No, we don't have any gas records.

(Informal discussion off the record.)

By Mr. Sharpe:

Q. Well, now, Mr. Fillpot, did it happen to you back in June of 1958 when you were at Rio Grande City doing this [fol. 41] contract work for Elmore & Stahl on occasions that you would open up a car after you had gassed the

honeydews for several hours, let it air out, look at the melons and you decide to put more gas to them?

A. On these cars here, you mean?

Q. Yes, sir.

A. I told you, I have no records; I can't tell you about those cars. We do on lots of cars, but I can't tell you about those.

Q. And the purpose of doing what you did to these cars to gas them was to change the color and to mature the melons in a short period of time; is that correct?

A. To help mature them, yes.

The Court: Let's take about a ten-minute recess. We are at recess; the jury may go outside or you may stay in here.

(Whereupon at 3:45 p.m. a recess was taken, after which, at 3:53 p.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

The Court: All right, you may proceed.

By Mr. Sharpe:

Q. Mr. Fillpot, a few minutes ago, you told us that after you had applied gas to a railroad car which contains [fol. 42] these honeydews that you, after a while, would open up the car, let it air out, and then look at the honeydews; is that correct?

A. That is right.

Q. How many honeydews do you usually look at?

A. Well, how many is in a car? We can't see all of them, but we can see everything that is in the squeeze, or close to the doors.

Q. Yes, sir. Well, that is what I asked you; how many do you look at?

A. I can't tell you the amount, but then, we look at everything that is in range of the doors that we can see.

Q. Everything that is within the range of the doors?

A. That we can see from the doors, yes.

Q. Yes, sir. Well, how many cartons or packages are within range of the doors when you open it to where you've got a full load there?

A. Possibly a half of the load.

Q. Half of the load?

A. Yes.

Q. When you gas a railroad car, is there usually a center brace in it or not?

A. It depends on whether you are loading cartons or [fol. 43] wood. On the wood crates there is a center brace in, yes.

Q. And on what other kind of cartons did you say?

A. On cartons, pasteboard cartons.

Q. Pasteboard cartons?

A. Cardboard.

Q. Is that a solid load instead of a center brace?

A. Solid load, yes.

Q. Usually how many layers of cartons are loaded in a shipment of honeydews in a railroad car?

A. I don't recall just how many layers.

Q. How many layers high?

A. Possibly six high.

Q. Six high. And about what is the height of the cartons?

A. I don't see that that comes within my part of the deal on gassing. I have nothing to do with the loading or that part of it at all.

Q. Well, are you really telling us, then, that you don't look at those honeydews after you finish gassing them? Is that what you are telling us?

A. I tell you I do look at them, yes.

Q. Well, then, I asked you how many do you look at?

A. I look at the melons next to the door.

Q. Well, take them one at a time, cartons first, pasteboard [fol. 44] board cartons. How many of the pasteboard cartons do you look at after you finish your gassing next to the door?

A. Just the ones that I can see right in the doorway.

Q. Well, how many will that be?

A. Well, it could possibly be ten or twenty. I don't—

Q. Ten or twenty?

A. Yes, sir.

Q. How long is an average railroad car, Mr. Fillpot?

A. How long?

Q. Yes, sir. What's the length of it?

A. About forty feet.

Q. I see. And if you are standing at the center of it, you, of course, would have to look approximately twenty feet in either direction, wouldn't you?

A. I would, to see the bag, yes.

Q. Yes. And let's take a shipment, now, of honeydews in cartons. Those are pasteboard cartons, are they?

A. Cardboard, yes.

Q. Cardboard. Are the melons completely covered, or do you have some openings in that type of container?

A. There's openings in the top.

Q. In the top?

A. In the top crate, yes.

Q. All right. Now, what do you do after you have [fol. 45] finished your gassing job by way of examining the honeydew melons?

A. Well, I just told you. I look at the ones in the doorway. I have no way of going back in the cars and see what the melons are.

Q. Well, do you look at the holes in the cartons, or what?

A. We take out a few cartons, maybe four or five, and look at the cartons.

Q. You say you might look at how many?

A. However, this hasn't anything to do with the melons here. I don't think carton loads—

Q. Well, sir, the number of samples that you look at has something to do with it, doesn't it, as far as you are concerned? Don't you want to determine whether you do your job right or not?

A. I do determine. If I didn't do it right, I wouldn't be there.

Q. Yes, sir. And you look at how many honeydew melons, now, after you have finished your gassing?

A. There isn't any certain amount.

Q. Well, what's the average?

A. We look at the melons in the doorway and if they are all right, we judge by that that the rest of the car is okay. That is the only thing we can do.

[fol. 46] Q. How many, on the average, do you look at?

A. I just got through telling you.

Q. From four to five?

A. Yes.

Q. Is that melons?

A. Cartons.

Q. How many melons will that be?

A. It depends on how many are in the crates.

Q. If they are eights, that would be five times eight is forty; is that right?

A. That is right.

Q. Well, where you've got a carload, as you do have in this case, of 640 cartons, you would look at at least one per cent, wouldn't you?

Mr. White: Let's keep the record straight here. There are 640 crates.

Mr. Sharpe: Crates, yes.

By Mr. Sharpe:

Q. Six hundred forty crates. You might look at one per cent of them; is that right?

A. Possibly.

Q. And what you do is, you look at these melons right in the center of the car and if they are all right, you just assume that the rest of the load is just like it; is that right?

A. That is right. We see the melons when they go in [fol. 47] there. We know they are out of the same field. We know they are the same kind of melons. So, naturally, they should be.

Q. Do you or not, Mr. Fillpot? We went through this just a few minutes ago, and I asked you about the melons coming into the shed and being packed and brushed and so forth and you started telling me you weren't concerned with them until they got in the railroad car. Now, which is right?

A. No, I don't remember making that statement. I am concerned with them. I check the melons as they come into the shed, while they are packing the melons, to see that they are—what kind of shape the melons are in.

Q. Do you have anything to say as to whether a melon shall go into a particular crate or carton?

A. No, I have nothing to say about that.

Q. That is determined by the people at Elmore & Stahl, isn't it?

A. That is right.

Q. All right. Now, then, in a full railroad shipment of cartons or crates, either one, you couldn't see more than just a few of them at the center of the car unless you crawled up in the top of the car in a narrow space and went down the car and took out individual samples; is that [fol. 48] right?

A. You couldn't take them out.

Q. That is right, you couldn't take them out for the simple reason that the crates are stripped and nailed clear across the car, aren't they?

A. I wouldn't say that they are.

Q. You don't know that?

A. No.

Q. Did you ever see a shipment of Juanbo? Did you ever see a shipment— Well, how many cartons or crates are usually in a railroad car?

A. How many cartons?

Q. Yes, sir.

A. Well, they will run as high—from eight forty, probably, in cartons and five seventy-five to six fifty in crates.

Q. I see. All right. And they are fastened in, aren't they?

A. I don't know. Yes, they are fastened in, but I don't know what you mean by "strips."

Q. You don't?

A. No.

Q. What happens, Mr. Fillpot, if you put too much gas on these melons in the car and they are made too ripe? What do you do then when you look at your samples?

[fol. 49] A. That is what I learn by working with these melons, with my hands, instead of getting it out of a book.

I know what to put on there and what not to.

Q. What I asked you is, what do you do?

A. I don't know. I don't put too much gas on them.

Q. You don't?

A. I haven't yet.

Q. Never have made a mistake in twenty-three years of putting gas on melons?

A. If I have, I never have been called on it.

Mr. Sharpe: We pass the witness.

Redirect examination.

By Mr. White:

Q. Mr. Fillpot, you did state you observed these melons as they come in and go through the grading process?

Mr. Sharpe: Now, Your Honor, I think we ought to get it straight. He did or he didn't. One time he says he does and the next time he says he doesn't. He is giving an opinion on condition one time on the basis that he did and then he didn't and I think counsel ought to ascertain it and the Court ought to rule on our objection, in the light of whether [fol. 50] he does or doesn't know about these melons.

Mr. White: Let me change that.

The Court: All right.

By Mr. White:

Q. The melons, generally, during this time, during June of 1958, for Elmore & Stahl?

Mr. Sharpe: We object to that, because of its generality and its lack of relationship to these shipments, Your Honor.

The Court: Overruled.

By Mr. White:

Q. And you state that you did, during that time, observe the melons as they were being unloaded and run through the grading process?

A. I am on the shed off and on all day long.

Q. And you state that you are not concerned with the way they are crated and packed into the car? When I say "concerned" with it, you don't have anything to do with how they are crated and packed?

A. No, sir, I do not.

Q. But you do keep abreast of the conditions and color of those melons during all of that time?

A. I do. That is part of my work.

Q. And the manner in which you go about your business, would you state whether or not it is the generally accepted practice throughout the industry in the United States?
[fol. 51] A. That is right, sir.

Q. And it's the manner of doing business that has been devolved in some twenty-three years' experience, as far as you know?

A. That is right.

Mr. White: Pass the witness.

Recross examination.

By Mr. Sharpe:

Q. Mr. Fillpot, can you tell this jury that you saw—on your oath—a single one of the honeydew melons involved in this case?

A. I cannot.

Mr. Sharpe: All right, sir. We pass the witness.

Mr. White: We are through with Mr. Fillpot. Can he be excused, Your Honor?

The Court: You want this witness any more, Mr. Sharpe?

Mr. Sharpe: Does he want to go back?

Mr. White: He wants to go back to Laredo. He's got two cars to gas tonight.

Mr. Sharpe: All right, we'll excuse him.

The Court: All right.

Mr. White: Thank you.

[fol. 52] (Witness excused.)

Mr. White: We'd like to call Mr. Ed Baker to the stand now.

EDWARD BAKER, called as a witness by the plaintiff, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. White:

Q. State your name and place of residence, Mr. Baker.

A. My name is Edward Baker. I work for Elmore & Stahl, Pharr, Texas.

Q. Where do you live, Mr. Baker?

A. I live in Pharr.

Q. And how long have you lived in Pharr?

A. Since 1937.

Q. How long have you worked for Elmore & Stahl?

A. Since 1952.

Q. And what is your general type of work that you do for Elmore & Stahl?

A. I am Office Manager for Elmore & Stahl.

Q. In that regard, are you familiar with the sales daily?

A. Yes, I am. I process the—all the car folders that [fol. 53] are handled during the day, all the cars that are sold.

Q. And you keep abreast of the market values of these commodities daily?

A. Yes, sir.

Q. In that connection, would you explain to the jury just how you do keep familiar with the market values and prices that these commodities are receiving or selling for on the various markets?

A. We have produce reporter machine that is called a Translux Crispo Reporter Market Service, comes out of New York, and it starts about six o'clock in the morning and it reports the current prices, New York and all the other major markets of the United States, the current price that items sold for that day, and that comes all through the morning.

Q. Now, in addition to that, do you keep in telephone communication with the various consignees or agents who sell these commodities for you in various markets?

A. Yes. Our salesmen are talking to the markets constantly and they are keeping abreast of the markets and the sale prices. The people that receive our merchandise wires us. If we don't talk to them on the phone, they wire us daily what our produce is selling for.

[fol. 54] Q. And what different manners of sale do you make? Would you explain to the jury briefly what an F.O.B. sale is, for instance, as distinguished from a sale on consignment?

A. There are a number of different ways that produce is sold. Produce is sold what we call "FOB," or F.O.B., which means the purchaser buys produce at the packing shed loaded in the car and at the time the car leaves the shed it's their produce. There's no recourse on it, as long as it makes the grade. Then we have a consignment sale, which means that we ship it to a merchant in some market and he handles that on a consignment basis and he charges us a percentage of the sales price for his services. Then we have a joint deal, what we call a "joint sale," which we agree with the purchaser the cost of the produce at the packing point. And if the produce brings a profit, over and above the joint cost or joint expense,—by the time you add on the freight and the cartage, inspection fees, demurrage, icing and all those charges, if the produce brings money in excess of all those charges, then, the profit is split equally. That is a normal joint deal.

[fol. 55] Q. Now, you mentioned that many of your sales are made on consignment; that is, where the selling agent, say, in New York, for instance, or Boston, as we have in this case, sells the car on consignment, he charges you a commission for selling that car?

A. That is right.

Q. And the more he sells the car for, the higher commission he gets?

A. That's true.

Q. The more money he makes?

A. That is right.

Q. The same for your joint sales; the more that they are able to sell the car for, the more profit for both of them?

A. That is

Q. Now, your F. O. B. sale, you say that the car is sold to the buyer for a certain price to you net in—at the point of origin, provided, now, that it arrives there in good condition; is that correctly stated?

A. Yes, that is true. F.O.B. sales are always sold on a condition basis. Otherwise, well, the receiver wouldn't accept the car if it wasn't in good shape when it arrived at destination. So there has to be a trust in both parties before you can make an F.O.B. deal.

[fol. 56] Q. Now, how about a car sold delivered? What does that mean?

A. Delivered? Some markets or some buyers want cars sold on a delivered basis, so that they will know exactly what the car is costing them at their receiving point. Also, it doesn't necessarily give them an out in case they don't want to accept the car, because if the agreement is made; whether it's delivered or sold F.O.B., there is always the possibility of the receiver wanting to refuse the car for some reason or other. However, if there are inspections made, the receiver has to have a real good reason before he can refuse acceptance on a shipment.

Q. In other words, if he buys a car that is represented to be a U.S. No. 1 car and it gets up there and is out of grade because of condition, why, then, he has a just cause in rejecting that car?

A. That's true, yes, sir.

Q. And in that event, what do you do?

A. Well, in that event, we try to get someone to handle it for us. If we can't sell it to someone else, we have to have one of our consignment merchants to take it off our hands [fol. 57] or take it and sell it for what he can get for it.

Q. Now, in Count I here is a car of honeydew melons which, according to the bill of lading which has been offered into evidence as "Plaintiff's Exhibit 1," is 640 crates of honeydew melons shipped out of Rio Grande City on June 12, 1958, and originally consigned to Elmore & Stahl at St. Louis; would you explain to the jury why it was originally consigned to Elmore & Stahl?

A. All of our honeydew cars are shipped out of Rio Grande City and we roll those cars or ship them daily and we don't put them in any particular place until they are

up the line. It's very occasional we do sell one sold F.O.B. Rio Grande City, but generally, no.

Q. In other words, this car was originally consigned by Elmore & Stahl to—

A. Let me mention one more thing. Rio Grande City is thirty-five miles or thereabouts from Pharr and those cars are usually billed out late in the afternoon or at night and the people up there, it's easier for us to just have them shipped to one destination. We get away from mistakes of shipping cars to points—that they might ship the wrong car to a certain place, so we just have them all shipped to El-[fol. 58] more & Stahl, and then we make the diversion to suit ourselves.

Q. And this particular car was billed out on June 12th, then diverted by Elmore & Stahl or reconsigned to Chicago, Illinois, on the 13th; would you check your records on that and then state what action was taken on that car on June 13?

A. I didn't quite get the question.

Q. Well, what action did you take on that car on June 13?

A. You mean what the car was sold for?

Q. Yes, and what diversion order was made with the Missouri Pacific Railroad Company?

A. This car here was diverted to a company, LaMantia Bros. Arrigo Company, at Chicago on June 13; it was shipped from Rio Grande City on the 12th. The invoice here from LaMantia Bros. Arrigo Company to National Tea Company, Chicago, was billed at three dollars a crate delivered Chicago \$1920.

Q. Now, on what date was that sale made?

A. Well, that sale was made on June the 13th.

Mr. Sharpe: If the Court please, we object to this evidence on the basis of an F.O.B. sale, because there is no showing, no contention, no pleadings, whatsoever, that the [fol. 59] railroad had any notice of that. Now, if you are going to limit it to market value, that is one thing, but we object to any testimony as to the price or the sale there between LaMantia Bros. and National Tea Company.

Mr. White: Your Honor, I am sure counsel has full records of this transaction. If counsel wishes to keep this evi-

dence out, of course, we'll contend for the top market on the day in which it was—the car arrived, which was much higher than the F.O.B. sale. I'm afraid we're limited in our damages by the F.O.B. sale.

Mr. Sharpe: Well, I want to get it straight as to what he's relying on. Now, if he's relying on an F.O.B. sale, I'll look at it in that light, but the pleadings do not so allege.

The Court: All right.

Mr. White: Did I understand Your Honor to—

The Court: I understood Mr. Sharpe was withdrawing it.

Mr. Sharpe: I am withdrawing it temporarily until we see what you are relying on.

[fol. 60] By Mr. White:

Q. You said that car was sold delivered for three dollars a crate?

A. Yes, sir.

Q. In other words, delivered—what do you mean by that?

A. That means delivered Chicago. We pay the freight and all the charges to Chicago. When it gets to Chicago, it's their merchandise for three dollars a crate.

Q. In other words, you get three dollars a crate or a total of \$1920, I believe it would be, and out of the \$1920 you have to pay the freight?

A. Yes.

Q. You have any other cost of sale, such as brokerage to the La Mantia Brothers?

A. On this particular car there was a brokerage charge of fifty dollars to La Mantia Brothers. We pay them the brokerage out of our profit.

Q. Now, what happened to that car when it got to the destination, Chicago?

A. Well, this particular car was refused by National Tea Company and La Mantia Brothers took it back and sold it on a consignment basis and handled the car for our account.

Q. And the account of sales, then, what does it show the gross sales received?

[fol. 61] A. Gross sales were \$1423.75.

Q. Now, what was the net that you realized out of that?

A. \$562.71.

Q. How much was the freight on that car?

A. The freight? \$605.92.

Q. Six Hundred five ninety-two?

A. Yes, sir, six-o-five ninety-two.

Q. And that you would have had to have borne even if the delivered sale had gone through?

A. Yes, sir.

Q. And you would also have had to pay La Mantia Brothers fifty dollars brokerage?

A. Yes, sir.

Q. In other words, you would have netted \$1275.18, had the car arrived in good condition and had been accepted by National Tea?

A. That sounds about right.

Mr. Sharpe: What is that amount?

Mr. White: Twelve seventy-five eighteen.

By Mr. White:

Q. But instead, you realized how much?

A. \$562.71.

Q. That would be a difference of \$712.47 less than you would have realized had the consignee accepted the car and had it arrived in good condition?

A. Yes, I suppose, if that figure is right.

[fol. 62] Q. You have also what has been offered into evidence a destination inspection certificate prepared by the United States Department of Agriculture, which shows this car to have arrived showing some decay and discoloration, and shows that it now fails to grade U. S. No. 1 only because of those condition factors; is that not correct?

A. That is right, yes, sir.

Q. And was that the reason the car was rejected by National Tea?

Mr. Sharpe: We object to that, Your Honor, unless he knows it of his own knowledge or unless it's supported in some place by the record. If it is, I will withdraw it. Is it?

Mr. White: Well, let me ask the question:

By Mr. White:

Q. Do you know?

A. No, I do not know why they rejected the car.

Q. Your records don't reveal the reason why they rejected the car?

A. No, other than this inspection certificate here. Usually, anyone that rejects a car has to have a good reason or else we wouldn't let them reject it. We wouldn't sit around and let them reject a car if they wouldn't give us a good reason for kicking one over. The first thing [fol. 63] we do is get us an inspection. If it comes up to what it should, we say "Okay, it's yours." If they want to argue about it, we call the P. A. C. A., which is the Perishable Foods in Washington, and they run over there real quick and get things straightened out.

Q. In other words, these matters are governed by government regulations?

A. Yes, sir.

Q. Are they not?

A. Yes, sir.

Q. And the consignee or receiver in that instance cannot just arbitrarily refuse to go through with the sale?

Mr. Sharpe: If the Court please, we move the question and answer be stricken for the reason that there is a completely different procedure set up for handling these P. A. C. A. cases, which has nothing to do with this case, and if Elmore & Stahl wanted relief under the P. A. C. A., they certainly could have gotten it.

The Court: If that is not involved in this case, it will be sustained on the grounds that it's immaterial.

[fol. 64]

By Mr. White:

Q. But examining that government inspection, would you state that that shows adequate cause for National Tea to reject the car?

Mr. Sharpe: We object to that as a conclusion based upon no evidence, and at best, hearsay.

The Court: Sustained.

By Mr. White:

Q. What is ordinarily valid cause for rejecting a car?

A. When it doesn't meet specifications or when it isn't good produce on arrival.

Q. Well, according to that inspection, was this car in good condition upon arrival at destination?

A. Well, according to this, it wasn't.

Q. Now, had it arrived in good condition, Mr. Baker, the sale would have gone through, but just in the absence of that, do you have market reports there and were you familiar with the market on the Monday morning in which that car was first available for sale?

A. Well, this market report here on June 16, which I guess that car should have gotten there about then.

Q. That would have been a Monday?

A. About five or six days later, after it shipped from Rio Grande City, honeydews in Chicago, Texas flats, 8s, [fol. 65] mostly \$4.00. Few four and a quarter. Standard 9s, which we are talking about, I guess; it's underlined here, \$4.00 to four and a quarter a crate.

Q. In other words, they would have brought and would have been worth how much, had they arrived in good condition?

A. Well, they would have been worth a dollar a crate more to the buyer. We sold them for \$3.00 and the market was \$4.00 then.

Q. How much would these melons have brought on the Chicago market had they arrived in good condition, disregarding the F.O.B. sale or the delivered sale, rather?

A. It says four to four and a quarter.

Mr. Sharpe: If the Court please, we move to strike the question and the answer, on the ground that the plaintiff has not related this particular shipment, as to quality and condition, to anything which might be covered by the United States Department of Agriculture market dates on the date in question, and we are not objecting to the report, itself.

The Court: Under the question asked, the objection is good. I will sustain the objection.

[fol. 66] By Mr. White:

Q. Now, Mr. Baker, are you familiar with the quality and condition of these particular melons had they arrived in good condition?

A. Am I familiar with the quality or the demand?

Q. What these particular melons in this car—would you be able to tell the jury approximately what quality they were?

A. I don't know what they were.

Q. Well, can you determine that from that government inspection?

A. Well, I can look at this government inspection here and it says that, "Now fails to grade U. S. No. 1 only account of discoloration and decay." I might add this, it says, "Quality: Mature, clean and well formed. Grade defects average six per cent, mostly scars." Then, "Now fails to grade U. S. No. 1 only account discoloration and decay."

Q. In the absence of that condition factor that is now in the car, they would have been U. S. No. 1, would they not?

A. I suppose so. I don't know. I am not an inspector. I don't know what the grades are. When they say, "U. S. No. 1," I don't know.

Q. You knew, though, that— Didn't you state that you [fol. 67] were familiar with the price that U. S. No. 1 or top quality merchandise honeydew melons were bringing on the New York Market?

A. Well, on the Chicago Market.

Q. Chicago Market, I mean.

A. They are talking about the best quality, good quality melons, four and four and a quarter.

Q. That's good quality?

A. That's good quality. There is a range there of four and four and a quarter. These melons sell on appearance, just altogether. If you have a melon that is beautiful and smooth and has the right texture and right color to it and right feel, that melon is going to sell better than one that has sunken spots and is discolored. They sell on appearance.

Q. What quality is higher than U. S. No. 1?

A. That is as high as they go, in vegetables and fruits. I don't know about citrus; they used to have different grades, but I don't know. I'm not an inspector.

Q. U. S. No. 1 is the top quality?

A. Yes, it's supposed to be, U. S. 1.

Q. And would be expected to bring the top price on the market?

A. Yes, I suppose so.

Q. Now, then, you are familiar with the operation of [fol. 68] Elmore & Stahl, are you not?

A. Yes, I am.

Q. They wouldn't ship honeydew melons, with decay and discoloration in them, to begin with, would they?

Mr. Sharpe: We object to the question, first, as leading. Secondly, because it is calling for a conclusion. Thirdly, it is not based upon any knowledge or any predicate which would authorize him to give it.

The Court: Sustain the objection.

By Mr. White:

Q. Can you state to the jury what these melons should have brought had they arrived at Chicago, Illinois, for the morning of the 16th in Chicago, June 16, 1958, had they arrived in good condition?

A. They should have brought our invoice price there.

Mr. Sharpe: He can answer that yes or no. We object to it. If he will answer it, why, then, I'll make no objection.

By Mr. White:

Q. Let me ask the question in this regard: Disregarding the sale, on your knowledge of the market reports—and I think you did state that you kept abreast of the sales daily—can you testify what these melons should have brought in Chicago on June 16—and you can refer to your [fol. 69] market reports for that purpose—had they arrived at Chicago for the market of the 16th in good condition?

The Court: Now, in regard to that question, you can answer yes or no, as to whether or not you are able to testify.

and do not answer as to any price or value and give counsel for defendant a chance to object.

A. Yes, I can tell from this market here—market report here.

Mr. Sharpe: We then renew the objection, Your Honor, if he pursues that, on the ground that he has not related this particular shipment there to anything that is covered by the U. S. D. A. Market Reports.

The Court: I believe the objection is good.

Mr. White: I don't quite understand that objection; that I haven't related—

The Court: As I understand— May I see counsel just a minute at the bench?

Mr. Sharpe: Yes, sir.

Mr. White: Yes, sir.

(Informal discussion off the record at the bench.)

[fol. 70] By Mr. White:

Q. Mr. Baker, let me rephrase my question. What price were honeydew melons from Texas in—that is, good quality and condition melons—bringing in Chicago, Illinois, on the Market of June 16, 1958?

A. Well, the only thing I have to go by is this report here, which is supposed to cover the market. Texas flat crates, jumbos or standards, 9s, four to four and a quarter.

Q. What size melons are these in this particular shipment?

A. Well, I'd have to see the manifest there.

(Instrument handed to the witness by Mr. White.)

A. These are standard nines. There are nine melons to the crate.

Q. Nine melons to the crate?

A. Yes, sir.

Q. And they were bringing from four to four and a quarter?

A. From four to four and a quarter.

Q. Now, I will refer to Count II here, which is a carload of melons out of Rio Grande City on June 1, 1958, 640.

crates. Do your records show what size melons those are? I believe the account of sales does.

[fol. 71] By Mr. White:

Q. Now, this shipment was billed out on June 1st, was it not?

A. Yes, sir.

Q. And where was it billed originally?

A. Billed to Elmore & Stahl, St. Louis.

[fol. 72] Q. And then diverted when?

A. Diverted on June the 3rd to York & Whitney in Boston.

Q. To York & Whitney in Boston?

A. Yes, sir.

Q. Is that where it eventually sold?

A. Yes, sir, it eventually went to York & Whitney.

Q. And state what type of sale arrangement you had with York & Whitney?

A. Well, let me look here. That was sold on a joint sale.

Q. And what price was received—

Mr. Sharpe: Excuse me. May I confer with counsel just a moment, Your Honor?

(Informal discussion off the record.)

Mr. Sharpe: We object to any agreement between Elmore & Stahl and the consignee or a person on the joint account that we're not shown to have notice of, Your Honor.

Mr. White: Your Honor, these records have been in the possession of counsel for many months.

The Court: May I confer with counsel?

Mr. Sharpe: Well, now, I don't think that is right.

The Court: May I confer with counsel just a minute?

[fol. 73] Mr. Sharpe: Yes.

Mr. White: Yes.

(Informal discussion off the record.)

Mr. White: Your Honor, we haven't gone through these various instruments with the jury. I might do that at this time and clarify some of these matters. It seems that we

are getting a little bit out of order in our introduction of proof. The jury is not aware of the fact that we have the account of sales in each of these cars offered into evidence with the stipulation that if the consignee were present in court he would testify that—

The Court: You might ask the witness, if you desire, what each instrument is, and show it to the jury. You have that right.

Mr. White: Well, that is what I was getting into.

The Court: It's been introduced in evidence under the stipulation that they were admissible. There's been no testimony concerning any of the instruments, I'll grant you that.

[fol. 74] By Mr. White:

Q. This instrument in Count II, which has been identified and introduced into evidence, Mr. Baker, as "Plaintiff's Exhibit No. 3," that is the account of sales, is it not, which shows what that particular shipment brought on the sale by York & Whitney in Boston, Massachusetts?

A. That is right, yes, sir.

Mr. White: (Speaking to the jury) And that instrument has been admitted into evidence by the Court, with the stipulation by counsel on both sides that if the consignee—York & Whitney—were present in Court, they would testify that this price that they received was the value of that commodity at the time and in its condition on arrival. In other words, in the condition that these melons were in when they arrived at Boston and at the time that they arrived, that that was the price they received. In this instance, they brought \$2,736.25.

By Mr. White:

Q. The next instrument, Mr. Baker, shows to be an inspection certificate prepared by the National Perishable Inspection Service in Boston, which shows the condition of the commodity upon its arrival at destination. Now, I will [fol. 75] address my remarks to you with reference to that inspection certificate, Mr. Baker. It does show, does it not,

that this particular car arrived in Boston, showing that the load had shifted and that many of the crates were out of alignment and that from zero to eleven, average four per cent, of the melons were seriously bruised?

Mr. Sharpe: If the Court please, I don't object to anything that would clarify these issues for the jury and will keep these various shipments straight, but I do object to counsel picking up an instrument which the jury can read and picking out the portion he thinks is favorable to him and emphasizing it and not reading the rest of it. If he wants to read it all, I won't object to that, but I object to him doing it piecemeal.

Mr. White: Your Honor, I don't know whether it's your practice to read all these instruments,—

Mr. Sharpe: Well, he didn't read the part that said, "no decay," for example.

The Court: All right, I think counsel may do that. If you have any questions about the instrument, you may ask [fol. 76] them. I think the jury, of course, can read the instrument in its entirety.

Mr. White: Surely.

By Mr. White:

Q. In your examination of that inspection certificate, Mr. Baker, would you state whether or not that particular shipment arrived in good condition?

Mr. Sharpe: We object to that as calling for a conclusion without any showing as to the standards used and the term "good condition" or that this witness knows them and is qualified to express an opinion.

The Court: Without showing the witness's qualifications, I believe the objection would be good.

By Mr. White:

Q. Mr. Baker, can you determine from your own knowledge, from examining that inspection certificate, whether or not— Well, are you familiar with the condition in which the melons should arrive?

A. Well, I am not an expert on that. I do know that after they arrive in good condition,—

Q. Now, what factors affect the salability of melons when they arrive at these markets? Are you familiar with that? [fol. 77] A. Well, I am familiar with this much, that they have got to be sound melons and they have to have a good appearance.

Q. And what factors in the way of appearance detract from their salability?

A. Well, bruises, sunken spots or sunken places, you might say, or places that show decay or discolorations.

Q. All right. You say "bruises"; do you find any indication on that inspection certificate that these melons were in a damaged condition as the result of bruising?

A. Yes, there is a place on here for that. It says, "BRUISING: Range zero to eleven, average four per cent seriously bruised melons. This bruising independent of pack bruising."

Q. Now, can you tell from examining that instrument, can you give an estimate as to the cause of that bruising, an opinion?

Mr. Sharpe: You mean the cause in this case, or generally?

Mr. White: The cause in this case.

Mr. Sharpe: Well, we object to it unless he has personal knowledge of it.

The Court: Sustained.

[fol. 78] Mr. White: Your Honor, I believe there is enough information on that inspection certificate that a man familiar with the business and familiar with inspection certificates can give an opinion.

The Court: May I see counsel just a minute?

Mr. Sharpe: Yes, sir.

Mr. White: Yes, sir.

(Informal discussion off the record.)

By Mr. White:

Q. Now, you have mentioned that discoloration does detract from the salability of them?

A. Yes, sir, discoloration detracts.

Q. Now, this shipment was due for the market of June 9, was it not, 1958?

A. The inspection was made, due the 9th.

Mr. Sharpe: I'll stipulate that with counsel, Your Honor, if he wants to, that the car was due and available for June 9, 1958.

The Court: All right.

By Mr. White:

Q. Now, that is the first market for which the car was available; you state that you are familiar with the market reports and you have the market report there for Boston, [fol. 79] Massachusetts, for June 9, 1958?

A. Yes, sir.

Q. Can you state what good quality and condition honeydew melons out of Texas were bringing on the market of Boston on that date?

A. Well, the range on that date, on various sizes, was four to four—

Q. Let me interrupt you. I think the record shows that these are 9s and 12s.

A. Nines and twelves? Nines, four and-a-half to \$5.00. Twelves, five to five and-a-half. Mostly five and-a-half.

Q. In other words, according to the top market there on honeydew melons, there were a hundred and twenty-eight crates, were there not, of No. 12s at \$5.50, which is the top market, you testified; they would bring \$704, for the 12s; 512 crates of No. 9s at \$5.00 would bring \$2560, or a total of \$3,264; isn't that correct?

A. Well, if your figures are right. I don't know; I'd have to—

Q. Well, you might check our figures on that. (Counsel hands the instrument on which he was figuring to the witness).

A. Is this the manifest here? That is true, the sale should [fol. 80] have been \$3264.

Mr. Sharpe: If the Court please, I understand what good quality and condition 9s and 12s, generally— He's not— He's answering the questions generally?

The Witness: That is right.

Mr. White: That is correct.

My Mr. White:

Q. What loss would that show, based upon that value as opposed to the sales value?

A. We had a loss of \$527.75.

Q. That is on Car No. 2 that went to Boston, Massachusetts?

A. Yes.

Q. Now, on Count III, a shipment out of Rio Grande City on the 16th day of June, 1958, the bill of lading indicates that the railroad received 560 crates of melons from Elmore & Stahl at that location on that date and according to the bill of lading receipted for them in apparent good order. The diversion order which has been offered in evidence shows that it was diverted on the 19th; is that not right?

A. That is true, yes, sir.

Q. And diverted to York & Whitney, I believe, again?

A. Yes, sir.

[Vol. 81] Q. And we have the account of sales here which shows that these melons brought a total of \$1,063.90 upon arrival at destination?

A. Yes, sir.

Q. Again I show you the inspection certificate at Boston, Massachusetts; would you read to the jury from that instrument the amount of bruising, if any?

A. "Range zero to twenty-five, average six per cent, seriously bruised melons in good order crates. This bruising independent of pack bruising."

Q. Also, on that inspection certificate it shows these melons to be fairly good quality; does it not?

A. Yes, that is what it says. Yes, sir.

Q. Now, Mr.—

Mr. Sharpe: I didn't quite get the witness's answer.

The Witness: Yes.

Mr. White: "That is what it says."

By Mr. White:

Q. Mr. Baker, this shipment was due and available for the market of June 25th in 1958 in Boston; you have the market reports issued in Boston on that date and do you have the records there showing what sizes these melons are?

A. Well, Texas honeydew crates, 8s, two-seventy-five [fol. 82] to \$3.00; 9s, two-seventy-five to three. One mark best three and-a-quarter 12s. Three and-a-quarter, yes, 12s, two-seventy-five to \$3.00. Mostly two-seventy-five.

Q. Now, these melons show on the account of sales— Does your record show what size melons are involved in this shipment?

A. Fifty-one three nine five?

Q. Yes.

A. That was a straight car of 8s; 560 crates of jumbo 8s.

Q. These are all jumbo 8s?

A. Yes.

Q. And what were they bringing in good quality and condition?

A. Eights, two-seventy-five to \$3.00. Two-seventy-five to three.

Q. Now, basing the sales price there on \$3.00, which I believe you testified was the top price, what would those melons have brought in Boston on that date?

A. Sixteen—

Mr. Sharpe: Now, if he's asking about these melons, Your Honor, I object to it, because of the lack of relation [fol. 83] of quality and condition. If you ask him generally, I won't object to it.

By Mr. White:

Q. Well, generally, good quality melons out of Texas in Boston on that date of June 25th at \$3.00, what would they have sold for?

A. It would have been \$3.00 a crate; \$1680.

Q. And they sold for how much?

A. \$1,063.90.

Q. For a loss of?

A. \$616.10.

[fol. 87] Cross examination.

By Mr. Sharpe:

Q. Mr. Baker, where do you live?

A. I live in Pharr, Texas.

Q. Where?

A. Pharr. Pharr, Texas.

Q. How far is Pharr, Texas, from Rio Grande City?

A. About thirty-five miles.

Q. And where is the principal office of Elmore & Stahl located?

[fol. 88] A. In Pharr.

Q. Is the operation of Elmore & Stahl at Rio Grande City a seasonal operation?

A. In the packing, it is, yes, sir.

Q. In the packing, you say?

A. Yes, sir.

Q. The evidence here, of course, shows that in the Month of June, 1958, four shipments were made from Rio Grande City by Elmore & Stahl by rail; three of these shipments were of honeydew melons, and the fourth of peppers. Now, during that period of time,—that is, in the month of June—Mr. Baker, where were you primarily located? Where were you working?

A. In Pharr.

Q. I think yesterday you testified that your title was Office Manager?

A. Yes, sir.

Q. And in that position you are not primarily concerned with purchasing and processing and shipment of melons or peppers, are you?

A. No, sir.

Q. Somebody else for Elmore & Stahl—one or more persons—handle those phases of the business?

A. That is right, yes, sir.

[fol. 89] Q. Who would be the man with Elmore & Stahl who would have been in charge of the operation in Rio Grande City in June of 1958?

A. Harold Hess.

Q. H-e-double s?

A. Yes, sir.

Q. What is his title with Elmore & Stahl?

A. He's the Shed Foreman, Shed Manager.

Q. Is Mr. Hess— Or, was Mr. Hess the Shed Foreman only at Rio Grande City for Elmore & Stahl, or did he work for the company at other places?

A. Only at Elmore &— Well, at Elmore & Stahl in Rio Grande City, and he also works in Mexico.

Q. Would you say he works more at Rio Grande City, or more in Mexico, or how is it divided?

A. Well, it's on a seasonal basis. He probably spends more time in Mexico than he does in Rio Grande City.

Q. In any event, in June of 1958, when Elmore & Stahl were conducting its shipping operation on honeydews and peppers, Mr. Hess was the Shed Foreman?

A. That is right, yes, sir.

Q. Where is Mr. Hess today?

A. He is in Mexico.

Q. What part of Mexico?

A. At Apatzingan.

[fol. 90] Q. That is about 876 miles south or southwest of Laredo, isn't it?

A. Yes. It's southwest of Mexico City.

Q. I believe you testified yesterday that you do not claim to have any personal knowledge of any of these four shipments which went out of Rio Grande City in the Month of June 1958?

A. Not specifically, no, sir.

Q. Mr. Baker, are you generally familiar with the method of harvesting honeydews in the Rio Grande City area?

A. Yes, I am.

Q. Well, let's see if this is a fairly accurate summary of it: The honeydew melon is grown on a vine, is it not?

A. Yes, sir.

Q. And out in the field, the honeydew first has to be cut from the vine; is that correct?

A. That is true.

Q. That is done by field hands?

A. Yes, sir.

Q. Out in the field?

A. Yes, sir.

Q. And when the honeydew is separated from the vine, what is it put into, generally—a sack or a box?

A. It's picked up from the ground in a sack, first.

[fol. 91] Q. Picked up by hand, isn't it?

A. Picked up by hand and put in a sack and loaded in a truck.

Q. It's placed in a truck?

A. Yes, sir.

Q. And usually, they carry— What size loads, usually, of melons will they carry in their trucks?

A. Those trucks are especially constructed with sideboards about eighteen inches high and they are padded inside. They have a removable tailgate that slides forward. As the truck is loaded, the harvest hands go up a ramp at the back of the truck and to start the truck, the tailgate is moved forward to the front portion of the bed, and then that portion is loaded or the melons are taken from the sack and as that portion is loaded, the tailgate gradually is pulled backwards.

Q. The melons are dumped into the trucks from the sacks?

A. They are poured into the truck from the sacks, yes, sir.

Q. And are you generally familiar with the fields or farms in the area of Rio Grande City where honeydews are grown?

A. Yes, sir.

Q. About what distances would be involved there, Mr. [fol. 92] Baker, from the packing shed?

A. Five to— We have one field that is only one mile from the packing shed. The other is five miles.

Q. And those trucks travel sometimes on dirt or gravel roads, sometimes on pavement, do they not?

A. That is true, yes, sir.

Q. And after the truck with a load of honeydew melons arrives at the packing shed, the melons, Mr. Filipot said,

were dumped from a truck over into some kind of receiving bin, I believe?

A. Yes. Would you like for me to explain that?

Q. Yes, sir. Yes, sir.

A. The receiving platform is a large platform that is about forty feet long and fifteen feet wide, has a gradual slope to it, and you might say this table here is the receiving platform and it's tilted slightly so the melons will roll down to a belt here (indicating). The platform is padded. The trucks come along the side there on a—there is a dirt mound we have built up so the truck will tilt as it comes up to the platform, and on the side of the bed we have one—that one side of the bed opens up, or there is one board along the edge that they can release, and it comes down and releases right on top of this platform and then the melons [fol. 93] roll right out of the truck into the platform here (indicating).

Q. What distance do we have involved there, where the melons roll from the truck down to the conveyor belt?

A. From the farthest point, I would say twelve to fifteen feet.

Q. Yes, sir. And then yesterday Mr. Fillpot testified generally about what happens after that; that is, the melons do go through a brushing machine, don't they?

A. Yes, they do. They go from the platform onto a belt, a wide belt here (indicating), that is moving all time. The melons gradually are moving all time and they go into an elevator and there is a brush there that loosens the dirt. They go back onto another belt and into the packing bins.

Q. That belt you are talking about is made out of what?

A. It's made out of belting material, cotton material, reinforced with nylon or cotton.

Q. What causes it to move, Mr. Baker—a series of rollers?

A. No; there is a motor at one end, and the belt either moves on a flat surface or it has rollers under it that support the load.

[fol. 94] Q. Are the melons graded for size somewhere along the process?

A. The melons are graded for quality. When they come out of the brushes they go over what we call a "grading table," and the melons— The grading table has rollers on it that revolves in a motion opposite from the direction that the conveyor is moving. This grading table is approximately four feet wide. The people stand on both sides of the grading table. There are fluorescent lights over the table so there is good visibility, and these people stand beside it there and as these melons go over the rollers, the rollers cause the melon to rotate so that the complete melon will be visible. As the melons move along there, the ladies and men that are—they have—anything that would cause them to not be good grade or quality, they put them in the cull-bin.

Q. Of course, at that stage, what is kept, what melons are rejected, is in the judgment of the grader that is doing that particular job at that particular time?

A. The shed foreman is responsible for the grade.

Q. Is that Mr. Hess?

A. That's Mr. Hess, yes, sir.

Q. And after they are graded, what is done with the [fol. 95] melons, Mr. Baker?

A. The melons come out from the grading table onto a belt that runs about fifty or sixty feet long. It's a wide belt about thirty-six inches wide and they roll into a large bin that is about ten feet deep, similar to this table here, you might say. It's slightly tilted. It's padded. On this edge down here (indicating), there is a board up about six inches high to keep the melon from going out on the floor that has a heavy pad on it. This belt moves along— The melons move along this belt and there is a board that's hooked onto the frame that shear the melons off, when they come up to this point (indicating). Then they—

Q. Excuse me. Is that a machine-operated board?

A. No; it's a hand-operated board. It's merely a side. It shears the melons off into this bin here (indicating). Actually, the belt is moving very slowly, and there women—there's one particular woman that all she does is keep the bins full. In other words, she'll run the melons into this bin. When it fills up, she'll come back and open up another one and she'll come back and roll it into another bin.

Q. Let me ask you at that point, how many layers of [fol. 96] melons do you have at that stage?

A. One layer.

Q. One layer?

A. Yes, sir.

Q. Just go ahead, please.

A. Then the packers are located at the bottom side of the bin. They size the melons as they pack. They will look— They are trained men that you don't learn this in books or anything; it's just a matter of—it's a knack for being able to pick out sizes that fit in a certain number in a crate. If they look at their bin, a good packer can look at his melons there and he will say he's going to pack a crate of 12s. He will pick out all the sizes there where they will fit snugly in the crate.

Q. In Counts I and II and III of this case, we have 640 crates—if I say "cartons," I mean "crates." What are those crates made out of?

A. They are made out of wood.

Q. Can you describe that crate to us?

A. Yes, sir. We have three size crates. I might mention three sizes. The most usual sizes for melons are what we call a "jumbo" crate and a "standard" crate. A jumbo crate, naturally, is larger. The ends are made out of a [fol. 97] solid piece of wood, not quite as heavy as this table here (indicating exhibit table). I think it's 11/16ths thick. It's sixteen inches long; as well as I recall, seven and three-quarters inches deep, and, of course, the crate has two ends. The sides are made out of a solid piece of material or wood that is made from white pine material. It is cut 5/16ths inches thick. The bottoms are made out of two-slats the same thickness. The crate is twenty-three and-a-quarter inches long, or twenty-three and-a-half inches long, depending on the tariff.

Q. Which crate is this, Mr. Baker?

A. Both the jumbo and the standard are the same width and length.

Q. Twenty-three?

A. Twenty-three and-a-quarter inches outside measurement. The standard crate is an inch shallower than the jumbo crate.

Q. One inch?

A. One inch.

Q. Now, let me ask you: The ends of these crates, of course, are solid, are they not?

A. They are solid, yes, sir.

Q. But the sides of the crates are made up of slats?

A. The sides are solid wood. We call them "slats" [fol. 98] because of the thickness. They are 5/16ths inches thick. Or the tariff says "sides"; it doesn't say "slats." It says "sides," are made up of material that has to be a certain specification, according to the tariff.

Q. Yes, but the question I am asking you, Mr. Baker, is: Is the side of this crate solid, or is it split up into slats?

A. It's a solid piece.

Q. One solid piece?

A. One single, solid piece, yes, sir.

Q. That is the type of container we are talking about in each of the counts that we have here that included honeydews; is that right, sir?

A. Yes, sir.

Q. And after the packer puts the honeydews into these crates and, as you say, he has to size them up and determine what number he will put in there, what happens to the crate of honeydews then?

A. I might mention one thing here that we need to complete the packing of these crates. The bottom of the crate is filled with excelsior, which nests the melons into the crate and is purposely put there to protect the melon. After the crate is packed, it is set off the packing hump, [fol. 99] what they call their packing hump, a little stand they put it on while they are packing it. They lift it off that hump, put it on a moving conveyor which carries the crate on down to the other end of the shed for lidding.

Q. Let me ask you about that excelsior matter there. Is the excelsior just on the sides, or does it appear elsewhere?

A. You can see the excelsior from the top of the crate. The melons are, naturally, nested into the excelsior. We have girls along the line that pull off the loose ends so that it won't have a bad appearance, so that it will have a neat-looking packing.

Q. Would you say that most of the excelsior is at the bottom with some lapping over the sides?

A. Yes, sir; the biggest part of the excelsior is on the bottom, yes, sir.

Q. Would you say that the crate goes down the conveyor after it's packed to the lidding machine?

A. Yes, sir.

Q. Would you describe that lidding machine to us?

A. The lidding machine that we use— There are a number of different types—a nailing machine and a lidding machine at the same time, it's a combination at the same time. As it comes into it, when the machine is put into operation, the lid is placed on the crate and the nail is [fol. 100] driven into the end of the lid to fasten it to the box.

Q. And after that, what happens?

A. The crate is set off from the conveyor to the floor. They are stacked up into, I believe, five crates high. They are set off according to size, and then we have men with clamp trucks or hand trucks that come in and get all of those crates and truck them into the cars.

Q. What is the average weight of a crate such as we have in each of these three honeydew shipments, 640—

A. Forty-five pounds.

Q. Forty-five pounds?

A. Yes, sir.

Q. Is that crate usually handled by one man?

A. How do you mean, "handled"?

Q. When it's moved from place to place, such as off of a conveyor belt onto the truck where it's to be carried?

A. Yes, sir, one man handles that. He sets it off the conveyor.

Q. And do you ever have a conveyor belt that runs directly into the railroad car?

A. No, sir, not in this case.

[fol. 101] Q. The crates of honeydews are taken from the place where the lid is put on them in trucks?

A. In clamp trucks.

Q. Clamp trucks?

A. Yes, sir.

Q. What's the difference between a clamp truck and any other kind?

A. A clamp truck has a device at the bottom that has two arms sticking out from the bottom of the truck. It has two small lips. These two arms are made out of metal. They are small, about this wide (indicating). They shoot out from here and there is a small lip welded onto the end of each truck and this device that—it's fixed in such a manner that when he brings the truck up to pick up the crate, he puts his foot on a thing that makes it go under the crate that is on the bottom of the stack and in that manner, he can lift the whole stack and the whole stack will lean back against the arms of the clamp truck.

Q. He lifts the whole stack at one time?

A. Yes, sir.

Q. That is usually what?—five layers or five crates?

A. Yes, sir.

Q. And they have been stacked up there by hand, have they not?

[fol. 102] A. Yes, sir.

Q. Now, when the clamp truck gets the layer or stack of honeydew crates over to the railroad car, how are they unloaded in the railroad car, itself?

A. They are taken into the car and the trucker, the man that is operating the clamp truck, releases a stack right in the car near the loader, wherever he happens to be in the car, in the end or it depends on where he is working.

Q. Does the truck drive into the car?

A. The truck doesn't drive. The man pushes the clamp truck into the car and sets a stack up, releases his load and goes back out again.

Q. Then he turns it over to the loader, doesn't he?

A. That is right.

Q. Now, I believe that all these loads in Counts I and II are the same. If they are not, why, I wish you would look at the papers here and correct me on it. Let's take Count I. The inspection at Chicago— By the way, there was no inspection made by the United States Department of Agriculture of any of these three loads of honeydews at Rio Grande City?

A. No, there wasn't.

Q. By your answer, you mean there wasn't any made?

A. No, there was none made at Rio Grande City.

[fol. 103] Q. Yes, sir. So, let's look at the inspection certificate at Chicago. It says, "eight layers, four rows, crosswise." Now, could you describe that a little bit more in detail for us?

A. Eight layers crosswise?

Q. Eight layers, four rows, crosswise.

A. Let me see that just a moment.

Q. Would you like to look at it?

A. Yes, sir.

Q. And, if it would help any, Mr. Baker, we've got a blackboard and some chalk there; you might draw it out if it would illustrate it better.

A. Well, this refers to the manner in which the car is loaded, and the inspection at Chicago, they always state what the appearance of the car is.

Q. Yes.

A. And it's eight layers; that means that there are eight crates high. There's one on top of another for eight high, and there's four rows, which means there's four rows in the car, the full length of the car. "Crosswise" means that the crates are loaded end to end across the car. Do I make myself clear?

Q. I think so. By "eight layers," that means that you have eight crates of honeydews, one on the bottom and [fol. 104] seven on top?

A. That is right.

Q. And the "four rows" means lengthwise down the car?

A. There are four rows of them lengthwise.

Q. And the crates would be crosswise?

A. Crosswise.

Q. Instead of endwise?

A. That is right.

Q. Now, with reference to that statement that in the car in Count I you had eight layers, does your man with the clamp truck usually pick up as many as eight in a layer?

A. No, sir.

Q. He would pick up how many?

A. He would pick up five. They usually stack those five

every time because he can't carry more than that many on the load.

Q. So when the clamp truck gets this layer of five crates of honeydews into the car, then somebody has to put three more in this type of load by hand, don't they?

A. The trucker doesn't actually position the crate in the car; he only brings the car to the loader and the loader takes these individual crates and places it in position in the car and if he's loading a car eight high, well, they [fol. 105] are eight high. This car happens to be eight high.

Q. Well, they start at one end?

A. They start at one end of the car, yes, sir.

Q. Well, from either end and work toward the middle, don't they?

A. That is right, yes, sir.

Q. So what you would have in this case in Count I, where you have eight layers, the clamp truck would take a layer of five crates into the railroad car and they would be positioned, starting down at the end, and then as the loaders work back, they put three more by hand on top of each layer; is that right?

A. I don't know what you are trying to drive at.

Q. I'm just trying to find out how they load the eight layers of crates of honeydews into this car.

A. This loader takes the crates and starts on the bottom and he loads across the car, crosswise. He has bracing material he puts in between the crates as he goes along, and we tell him—or Hess tells him—how many crates he wants to load in this car, and he figures out from how many crates he wants to load; that determines how high he's going to go, because the floor space remains the same. You see what I [fol. 106] mean? If he's going to load five forty, he wouldn't go eight high; he would only go seven high, perhaps.

Q. Yes, sir. Now, let me be certain about the width or depth, whichever is the correct word of these crates. Is it seven and-three-quarter inches?

A. Yes, sir.

Q. So that when a man has five, the loader in the railroad car has five of these crates piled on top of each other; he has a little bit less than forty inches, doesn't he, whatever five times seven and-three-quarters is?

A. Yes.

Q. Three and-a-half feet. Then he has to take a crate, I suppose one at a time, and put on top of that layer as he works up to eight; is that correct?

A. Yes, sir.

Q. And when he gets to eight, he's got something over sixty inches there?

A. Well, I don't know how high it is.

Q. It would be five times seven and-three-quarters, wouldn't it?

A. The whole purpose of loading what you can in a car—

Q. Or eight.

A. There is a minimum weight that you must make to get [fol. 107] the proper freight rate. Naturally, we try to get as close to our minimum weight as we can, because, otherwise, you would pay excessive freight. You wouldn't want to load a car half loaded and have to pay the same amount of freight as you would fully loaded.

Q. You usually try to get around 30,000, don't you?

A. On melons, I don't— Let's see the bill of lading. These are billed at 640 crates, 29,440 pounds.

Q. Now, you mentioned a while ago, Mr. Baker, that the loaders in the cars use some kind of bracing material; would you go into a little bit more detail about that? Tell us what kind of material it is and how is it placed against the crates or on them?

A. This bracing material is recommended by the railroad; it's in the railroad tariff.

Q. Mr. Baker, would you pay attention to what I am asking you. I just asked you how the loader in the car loaded these in there; I didn't ask you anything about railroad tariffs. You've got a lawyer here; he can develop that if he wants to. My question to you is not about tariffs, but how the—

A. Bracing material is— Let me see how I can explain this a little clearer. The bracing material that we use are pieces two-by-two, approximately—well, they are about [fol. 108] seven feet long, six or seven. I'm not sure about the dimensions on the thing. But they are cut out of— They are two-by-two square and six or seven feet long and they are high enough to go up above or to the top of your

load. When a man starts loading, they are specially built, what we call "corners." There are two pieces that are two-by-twos that are nailed together with a block on each end that fits right into the corner. And then the crate, when it's loaded, the square corner of the crate will fit right into this position in—it's a little nick right in there, you might say; it builds a little locket piece. Each corner has one of those, and then as we come along with the crates, there is a divider between each crate which separates the crates a small amount. And these little blocks keep the crates separated and lock them in position.

Q. Now, the bracing that you mentioned there is nailed at certain places to keep it intact?

A. It is not nailed at all, no, sir.

Q. It's laid in there loose?

A. It's locked in position by the crates.

Q. There's no nailing used at all on it?

A. Not in the bracing, no, sir. Not in the Pierce brace [fol. 109] ing.

Q. Now, then, when you come down to the place where the loader has filled the car right up to the center, what type of bracing is used there?

A. That is made— The gate is made from two-by-fours and one-by-fours.

Q. And is the object of that center brace to push each side of the load out as far as possible to keep it tight and intact?

A. The object of the center brace is to keep the load from shifting.

Q. Yes. Now, everything that we've talked about up to now, as far as this loading is concerned, is done by the shipper, isn't it, Mr. Baker?

A. Yes.

Q. The railroad has nothing to do with that?

A. Yes, they do. The railroad doesn't do the work,—

Q. You mean they have employees there?

A. —but they set the rule that we have to follow.

Q. But the employees who do this work are the employees, in this case, of Elmore & Stahl, aren't they?

A. Yes, sir.

Q. Now, you were here yesterday afternoon when Mr. Fillpot testified about gassing these melons, weren't you?
[fol. 110] A. Yes, sir.

Q. Is that actually in your field, Mr. Baker? Do you know anything about that, or would you have to depend on what you have heard or what somebody else has told you about it?

A. I don't know anything about gassing, except that I know you have to gas melons to sell them, honeydew melons.

Q. Especially to improve their appearance, colorwise; that is true, isn't it?

A. Well, they gas— Well, I can only tell you this from the shippers' point of view. You have to gas them to make them edible and have the proper appearance.

Q. To make them edible and have the proper appearance?

A. Yes, sir.

Q. Now, Mr. Fillpot's company is on some sort of a contract basis with Elmore & Stahl, I suppose?

A. Yes, sir.

Q. They are paid by the car, by the hour, or how are they paid?

A. By the car.

Q. By the car?

A. Yes, sir.

Q. In other words, they get the same amount of money, [fol. 111] regardless of what they do on a particular car?

A. Yes, sir.

Q. Have you observed that gassing operation in progress, Mr. Baker, at anytime?

A. Yes, I have.

Q. The tank of ethylene gas and the—the hose, rather, from it, is placed right in the center of the car, is it not?

A. Yes, sir, it's placed in the door of the car.

[fol. 112] Q. Mr. Baker, can you tell us as a shipper's representative what color you want honeydew melons to be on the markets at the time they are to be delivered?

A. A creamy color.

Q. Creamy?

A. Yes, sir.

Q. Do you want any green in them?

A. Not if you can help it, no, sir.

Q. I beg your pardon?

A. No, sir; you would not.

Q. As a matter of fact, one reason—that is one reason for the gassing process, isn't it, to take the greenish or [fol. 113] tingly color out of them?

A. You know, I am not familiar enough with gassing to go over that.

Q. Well, that's all right. You prefer them to be a creamy color?

A. Yes.

Q. How about white?

A. White is all right.

Q. As a honeydew melon gets more mature and riper, what color does it tend to change to?

A. A vine-ripened honeydew has a yellow cast to it.

Q. Well, let's take a melon that has been gassed in a car and shipped for five or six or seven days after it's cut off of the vine and it starts to ripen; let's say it's taken out and not put under refrigeration and kept for a period of time, what color does it tend to take on?

A. I don't think I have ever seen a melon except in the stores here that has been taken out of refrigeration.

Q. You have seen one sometime or another that just keeps on ripening out in the open or not under refrigeration, haven't you?

A. Now, do you mean after it's gassed?

Q. I beg your pardon?

[fol. 114] A. Do you mean after the melon has been gassed?

Q. Well, let's just start with— Yes, yes, one that has been gassed and the color has changed and it's been put out in the open and time runs on it; what color does it tend to take on?

A. I don't believe the color would tend to change any.

Q. You think it would still be white and creamy?

A. I believe it would.

Q. White or creamy?

A. Yes.

Q. Even when it starts to decay?

A. I believe that it would. I don't think it would— Of course, it might show decay spots or show sign of decay, but I don't think the color of the melon, the skin, would actually change any.

[fol. 119] A. There is no plating on the honeydews at all; so we don't have an inspection on honeydews. The appearance of the honeydew sells itself. We only put up the best melons in a honeydew pack. That is the reason we don't have an inspection.

Q. You try to, you mean?

A. We do. We put— We throw, I'd say, from twenty-five to fifty per cent of our melons on—are taken back as culls.

Q. Now, do you have any record— Now, yesterday I saw you with a number of little file folders in here and Mr. White asked you a question about one shipment; you took it and referred to it. Do you have your file folder on these shipments with you?

[fol. 120] A. Yes, sir.

Q. Do you have anything in any of them that would show the kind of inspection or grading that was made on these honeydew melons?

A. No, sir. We didn't have any inspection on them.

Q. In other words, you don't keep those records?

A. We don't have an inspection.

Q. You didn't make them to start with back in June of '58?

A. We did not have any inspection made on the melons by the government.

Q. Now, the man who would really know more about these honeydew melons than anybody else, the ones that were packed back in 1958, would be Mr. Hess, wouldn't it?

A. Yes, sir.

Q. Is he going to be here?

A. No, sir.

Q. Well, now, this case was set for trial—and this Court's docket will show it—on the 6th day of February; it was

officially set by this Court for jury trial on this date. You, as office manager, haven't made arrangements with Mr. Hess to come here and tell this jury about the condition of those honeydew melons?

[fol. 121] A. No, sir, I haven't.

Mr. Sharpe: All right. We later want to offer that docket entry in evidence here, Your Honor.

Mr. White: Your Honor, in that regard, I think we might read into the record—I'd like to get into the record the date that suit was filed, the date in which the Defendant's Answer was filed.

Mr. Sharpe: That's all right.

Mr. White: May we get that from the—

Mr. Sharpe: I prefer to go ahead and present my own case in my own way,—

Mr. White: Counsel brought that point up.

Mr. Sharpe: —and let counsel present his when he gets to it.

By Mr. Sharpe:

Q. Mr. Baker, are you telling us that you have never had a United States Department of Agriculture inspection on honeydew melons that you have shipped from Rio Grande City?

A. That is right.

Q. You never have?

A. No, sir.

Q. In the history of the operation as you know it up [fol. 122] there?

A. We never have had an inspection on them, no, sir.

Q. You are not educated in either horticulture or plant pathology, are you, Mr. Baker?

A. No, sir.

Q. You wouldn't attempt to give us any opinions, therefore, about decay and sunken areas and discoloration or things like that in honeydews, would you?

A. No, sir.

Q. Is there anybody up there at Elmore & Stahl that does know about those things?

A. There is no one that is a pathologist there, no, sir.

Q. Where does Mr. ~~Elmore~~ live?

A. He lives in McAllen.

Q. Where does Mr. Stahl live?

A. Live?

Q. Yes, sir.

A. He lives in McAllen.

Q. Are they up there in Hidalgo County today?

A. Mr. Stahl is in Mexico and Mr. ~~Elmore~~ is probably in Pharr.

Q. You haven't seen them around the courthouse here yesterday and today, have you?

A. No, sir.

[fol. 123] Q. I want to show you the exhibits on Count II, Mr. Baker, of this case, which involves a shipment of honeydews from Rio Grande City on June 1, 1958, and in particular, I want to show you the exhibit which has been marked "Count II—P-4"—that indicates the Plaintiff's Exhibit 4 on this count—and that is the destination inspection certificate made by the National Perishable Inspection Service at Boston, and I want you to look down under the heading "CONDITION"; right where I have my thumb there. Do you see that, sir?

A. Yes, sir, I can see it.

Q. The first notation immediately following the word "CONDITION" is this, isn't it, Mr. Baker: "No decay noted"?

A. That is right.

Q. You see that?

A. Yes, sir.

Q. And then the next notation is: "Range zero to twenty-two, average seven per cent, show light brown discolored areas." Do you see that?

A. Yes, sir.

Q. Now, do you know enough about that inspection certificate or the way these inspectors examine honeydews at destination to tell us what that means? If you don't [fol. 124] know, sir, just tell us you don't.

A. I don't know.

Q. All right. Will you look up under the heading of "BRUISING"? I think it's the third notation. Do you see that?

A. Yes, sir.

Q. Where it says: "Range zero to eleven, average four per cent seriously bruised melons"?

A. Yes, sir.

Q. Now, I want to ask you this, Mr. Baker: When a melon is cut off the vine and the man out in the field picks it up and puts it in a sack, there is an opportunity for bruising there, is there not?

A. Yes, sir.

Q. And when he takes that sack to the truck and rolls it or dumps it or puts it from the sack into the truck, there is an opportunity for bruising there, isn't there?

A. Yes, sir.

Q. And when the truck gets down to the packing shed and the honeydews are rolled out or taken out from the truck onto the receiving bin, there is an opportunity for bruising there?

A. Yes, sir.

Q. And that is true down through the stage there where [fol. 125] the honeydews go into the bin; they are placed by hand over in the crates and when the lid is put on the crates, there is an opportunity for bruising if they are not handled properly at every one of those stages, is there not?

A. Yes, sir.

Q. And when the crates are put into the railroad car and the loader puts them in there, puts the stacks down, and then if he's got five that are taken in there by the little clamp truck, they have to put three more on top by hand, there is an opportunity for bruising there, isn't there?

A. Yes, sir.

Q. And when the bracing material is put in there, there is again an opportunity for bruising, is there not?

A. Possibly.

Q. All right. Now, I wish you would continue to look at that same exhibit that I handed you, Mr. Baker, and look down under "QUALITY, DESCRIPTION, Etc." Do you see that?

A. Yes.

Q. And look at the last—next-to-the-last sentence in that paragraph, and I quote from the report. Now, this is the

report that your own attorney offered in evidence, I quote from it: "Pale whitish green color." Do you see that? [fol. 126] A. Yes, sir.

Q. Now, those honeydews got up there with some green color in them, didn't they?

A. Yes, sir.

Q. And that is not desirable, is it?

A. There is a stipulation on this: it says, "fairly good quality."

Q. Well, that is the next one. I'm just asking you about the color.

A. They would be better if they were cream, yes, sir.

Q. I beg your pardon?

A. It would be better if it had a creamy color.

Q. And the next notation on this report that has been offered by the plaintiff is: "Fairly good quality." Now, you know that there is a difference between a notation of "fairly good quality" and "good quality" and "best quality," don't you, Mr. Baker?

A. The trade usually says, "good quality," "fair quality," and "poor quality."

Q. Well, suppose we start at what you think the trade uses to designate the very best quality that you can have. What's the very best quality that you can have? Is that the word that is used, or is it some other word?

[fol. 127] A. I believe these inspections usually say "good quality," their top quality. They don't go into classifications of good quality.

Q. They do not?

A. I don't believe. They say, "good quality."

Q. Well, the way you understand it, Mr. Baker, what is the word or the term that is used in the trade to describe the very top, best quality of honeydews? If you don't know, it's all right; you may say so.

A. Well, the reports show on the reports; I have heard them described as "beautiful."

Q. You are in the trade of selling honeydews, aren't you?

A. I'm not a salesman, no, sir.

Q. You're not?

A. No, sir.

Q. Well, am I asking you about something you really don't know about here?

A. You are asking me about something that I am not familiar with directly.

Q. I see. Well, I don't want you to testify about anything you really don't know about. So I will ask you this one further question, then: Can you tell us the difference between "good quality" and "fairly good quality"?

[fol. 128] A. I would say "fairly good quality" is not quite as good as "good quality."

Q. All right. And you wouldn't ordinarily expect fairly-good-quality honeydews to bring the top market, would you?

A. No, sir.

Q. Now, I'd like to trade you the exhibits on Count III which involves a car of honeydews that were shipped—that was shipped on June 16, 1958, from Rio Grande City, and call your attention to the exhibit which is marked "Count III—P-4"—that means the plaintiff's Exhibit 4 on Count III. I'd like to hand you that, sir, and that again is the National Perishable Inspection Service destination report about these honeydews at Boston. Now, will you look under the heading "QUALITY, DESCRIPTION, Etc." and look at the last line and see if I quote it correctly: "Most melons yellow." Do you see that?

A. Yes, sir.

Q. That is not desirable, is it, Mr. Baker?

A. Yes, a yellow, creamy to yellow melon is all right. It all depends on what he means by "yellow." There are so many variations of yellow.

Q. Is this tablet that I am holding here a shade of yellow?

[fol. 129] A. Yes.

Q. Is this file holder a shade of yellow or not?

A. I would say so, yes.

Q. Well, now, look at the last sentence again under "QUALITY, DESCRIPTION, Etc." on this inspection report.—this is on Count III—where it says: "Balance pale whitish green color." Do you see that?

A. Yes, sir.

Q. It's got some green in those melons again?

A. Yes, sir.

Q. Maybe Mr. Fillpot didn't gas it long enough; could that be possible?

A. He has to— Well, now, that's his opinion. I don't know.

Q. Now, on "CONDITION" in that car, look at the notation which says: "Range zero to twenty-five, average between two and three per cent soft rot decay." Do you see that under "CONDITION"?

A. Yes.

Q. And then the last sentence in that same—under that same heading says: "Range zero to twenty-five, average six per cent internal breakdown." Do you see that?

A. Yes, sir.

[fol. 130] Q. Now, Mr. Baker, do you have anything in writing that you can show the Court and the jury that will disclose how much soft rot decay these horseydeus had in them at Rio Grande City or how much internal breakdown they had in them at Rio Grande City, Texas?

A. As far as I know, they didn't have anything, no internal breakdown.

[fol. 131] By Mr. Sharpe:

Q. Mr. Baker, during the recess I have looked at the little file folders you gave me and contents and there are some of these instruments that I want to offer in evidence. Now, so we can keep this thing as straight as possible, bearing in mind that we have four shipments here, I will hand you the papers on Count I. Will you give us the refrigerator car number there, please, sir?

A. ART 35042.

Q. All right, sir. I have your file here on that car in that shipment, 35042?

A. Yes, sir.

Q. I just wanted you to identify it. Now, in the file there is a form which is headed off: "ELMORE & STAHL, PHARR, TEXAS," with the car number, ART 35042, with a number of notations on them and I'd just like for you to look at that for a moment. Is that a record on this shipment that was kept in the usual course of your business?

A. Yes, sir.

Mr. Sharpe: Mr. Reporter, will you mark that "Defendant's Exhibit No. 1" in connection with Count I?

(Whereupon the instrument referred to was marked for identification by the Court Reporter as follows: "Count I—Defendant's Exhibit No. 1.")

Mr. Sharpe: We offer it.

Mr. White: No objection.

[fol. 133] (Whereupon "Defendant's Exhibit No. 1" in connection with Count I was received in evidence. Please refer to INDEX TO EXHIBITS for location of this instrument in this STATEMENT OF FACTS.)

By Mr. Sharpe:

Q. All right, sir. I believe that is all I will offer on Count I and I will hand it back to you. Now, it's going to be a little difficult for me to ask you questions about this instrument, Mr. Baker, without both of us looking at it.

Mr. Sharpe: Could I stand right there for just a second where we both can look at it?

The Court: You may.

By Mr. Sharpe:

Q. This instrument is marked "Count I—D-1"; can you see it there all right, Mr. Baker?

A. Yes, sir.

Q. And up at the top left-hand corner is a notation: "E and S"; what does that mean?

A. That denotes the brand.

Q. The Elmore & Stahl Packing Company have a number of brands that they use; what are they known as?—trade names or trade brands, or what?

A. We have trade brands which are registered brands.

Q. And there is a notation on the right-hand side: "Car ART 35042" and over on the left: "Start Load 6/10"; that would be June 10 at "1:00 o'clock p.m., 1958." Do you see [fol. 134] that?

A. Yes, sir.

Q. And "Completed Load 6/10 4:45 p.m., 1958." Do you see that?

A. Yes, sir.

Q. In other words, that loading process there took three hours and forty-five minutes?

A. Yes, sir.

Q. That was a full carload of honeydew melons?

A. Yes, sir.

Q. Now, then, over on the right-hand side—of course, the jury will have this to study later on—you've got some notations, it says: "Sunsilt"?

A. Sunsilt, yes, sir.

Q. What does that mean?

A. That is the name of the farm where the melons came from.

Q. All right. And underneath that, would that be a brand name?

A. No, sir; that would be the name of the farm, Sunsilt Farm.

Q. Then you have "E & S"?

A. Yes.

Q. That indicates a farm that belongs to Elmore & Stahl on which these honeydews were produced?

[fol. 135] A. That does, yes, sir.

Q. Same thing with Sunsilt?

A. Sunsilt is owned by another man.

Q. Then you've got two notations of "Sunsilt"?

A. Yes.

Q. Then you have in a column here various notations; what are those?

A. Those are the number of crates loaded in each tier.

Q. Number of crates loaded in each tier; that is, inside the railroad car?

A. Yes, sir.

[fol. 136] Q. And you have testified that indicates— Is the "E & S" brand printed on the crate or the cover? Where does that appear?

A. It's labeled on the end of the crate. It's our top brand, E & S.

[fol. 156] Redirect examination.

[fol. 157] By Mr. White:

Q. In your experience in handling these matters, have you seen several of these inspection certificates?

A. You mean at origin?

[fol. 158] Q. At destination.

A. Yes, sir. I see all of them that come in.

Q. And are you familiar with the effect of these conditions upon the market value of the commodities?

A. Yes, sir. If you have decayed produce, you certainly can't get top price for it.

Q. Have you developed in your experience in this business over seventeen years a general knowledge of what causes the decay in some instances?

A. Yes. Improper refrigeration, I would say.

[fol. 163] Q. What is the effect of the bruising on the salability of peppers, or on the honeydew melons in this instance?

A. Bruised spots show up causing decay and discoloration. These melons sell on appearance. If they look like they are bruised in any way or decayed, well, you can't sell them. They won't bring the top price. They won't bring any price if they are too far or too badly bruised.

DEPENDANT'S CASE:

[fol. 170] S. D. ROBINSON, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Would you please state your name to the Court and jury?

A. S. D. Robinson.

Q. Where do you live, Mr. Robinson?

A. Palestine, Texas.

Q. How long have you lived in Palestine?

A. Since I was born.

Q. I won't ask you how long that's been. By whom are you employed?

[fol. 171] A. Missouri Pacific Railroad.

Q. How long have you been connected with the Missouri Pacific Railroad Company?

A. Since 1941.

Q. What is your present title and position?

A. Traveling Freight Claims Adjuster.

Q. In that position is it part of your responsibility when a claim is filed to a shipment of perishables to secure the appropriate papers from the various carriers showing the record of movement of the car; that is, starting at the place where it's shipped to the place where it wound up and was sold and a record of protective service; that is, of icing of the car and the vents and plugs and so forth?

A. The records are actually obtained by the investigators in the office and then it's my duty to take them out and handle them after the investigations are completed.

Q. Yes, sir. Now, in this case we have four separate shipments involved that have been described in Counts I, II, III, and IV of the petition; have you compiled the information as to the record of movement and protective service on each one of those cars and have those exhibits [fol. 172] now been marked by the Court Reporter?

A. Yes, sir.

Mr. Sharpe: Your Honor, at this time we will offer in connection with Count I, which involves Car ART 35042, the record of movement from Rio Grande City, Texas, to Chicago, Illinois, and the record of protective service, and a summary of those matters contained on the top sheet.

[fol. 173] Mr. White: We have no objection.

The Court: All right, they will be admitted.

By Mr. Sharpe:

Q. Now, Mr. Robinson, I want to hand you the exhibits concerning Count I, which involves Car ART 35042, a

[fol. 174] shipment from Rio Grande City, Texas, to Chicago, Illinois, of honeydews, and ask you to examine this exhibit while I ask you some questions about it. First of all, when was that— Do you have a notation there of when the car was loaded and when its loading was completed?

A. Yes, sir. The loading commenced at 9:00 a.m. on June 11th; completed at 2:00 p.m. on June 11th.

Q. Now, if you will, Mr. Robinson, speak out a little louder so I can be sure and hear it; the air conditioner is going on here. A little slower; now, when was the loading started on the car?

A. On June 11th at 9:00 a.m.

Q. All right.

A. And completed on June 11th at 2:00 p.m.

Q. When was the car actually released from Rio Grande City?

A. On June 12th at 3:00 p.m.

Q. Now, would you just trace its movement to, destination there from your run sheet?

A. Do you mean by that, the actual movement record?

Q. Yes, sir. Tell where the car went to.

A. The first junction point was Dupo, Illinois, where it arrived on June 15 at 12:15 p.m., where it was delivered [fol. 175] to the Illinois Central Railroad June 15th at 4:20 p.m.

Q. Illinois Central, you say?

A. Yes, sir.

Q. It traveled on the Missouri Pacific from Rio Grande City to Dupo, or did it go on Texas & Pacific for a while?

A. It moved all the way by Missouri Pacific.

Q. Missouri Pacific from Rio Grande City to Dupo. Now, where is Dupo located with reference to St. Louis, Missouri?

A. It's across the river from St. Louis proper.

Q. So, for all practical purposes, unless we make a distinction, when we say "Dupo," we are talking about the area of St. Louis, are we not?

A. That is correct. It's considered a part of the St. Louis Switching District.

Q. All right. After the car was transferred to the Illinois Central Railroad at Dupo on the 15th, where did it go then?

A. It departed East St. Louis at 5:15 p.m. and went to

Chicago, Illinois, where it arrived the following morning at 3:15 a.m.

Q. Now, was there a diversion order on this car, or a reconsignment?

A. Not until after arrival of the car at Chicago.

[fol. 176] Q. All right. Now, when was the diversion order or reconsignment?

A. Let me correct my statement there. There were two diversions filed on it. There was a change of ownership diversion. The first one was filed June 13th.

Q. Is that in the file?

A. Yes. I overlooked that because it was not noted on the run sheet, is the reason I didn't give you that at first. The second reconsignment was on June 17th at 12:05 p.m.

Q. Now, was the car at Chicago, Illinois, at that time, or where was it?

A. Yes, sir, it was on a hold track at Chicago.

Q. 6/17/1958 at what time?

A. 12:05 p.m.

Q. All right. Now, when was the car actually placed for market?

A. The car was actually placed on the hold track on the original arrival on June 16th at 6:20 a.m.

Q. That is June 16th?

A. After the order filed on the 17th, it was then placed to the consignee prior to 7:00 a.m. on June the 18th.

Q. All right. Now, are you familiar with the schedule— [fol. 177] As a matter of fact, on your run sheet, is the schedule for this particular car set out there?

A. Yes, sir, it is.

Q. Considering the reconsignments and diversions that were made, Mr. Robinson, was there any delay in the handling of that car to its destination?

A. No, sir, it was not. The original schedule— Regardless of the diversions, the car was due to be in Chicago for delivery to the C. P. T. Company—which is the Chicago Produce Terminal Company—on June 16th at 3:00 a.m.

Q. All right, sir. Now, in connection with the information that you have there on the right-hand side of the summary sheet, you also have a record of the icings, do you not?

A. Yes, sir.

Q. I am not going to ask you any particular questions about those, Mr. Robinson, because we have another witness here, but I do want to call your attention to the fact that you have a record of the icings on the summary sheet, as well as the movement of this car?

A. Yes, sir.

[fol. 183]

Cross examination.

By Mr. White:

Q. Mr. Robinson, your testimony has been not from the original records but from copies made for the purpose of this trial; is that right?

A. Yes, sir.

[fol. 184] Q. Now, you have stated that these records are copies that have been made for the purpose of this trial?

A. Might I be permitted to clarify my answer to that question just minorly?

Q. Surely.

A. They were copies, but they were not prepared primarily for the purpose of this trial, but were prepared in the course of our investigation of the claim after the claim was filed, not specifically for this trial.

[fol. 185] J. A. FRIEND, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. J. A. Friend.

Q. Where do you live, Mr. Friend?

A. St. Louis, Missouri.

Q. About how long have you lived in St. Louis?

A. Since 1911.

Q. What is your present business or occupation, Mr. Friend?

A. I am retired.

Q. Before you retired, what was your business or profession?

A. My last position was with the—I was Superintendent of Refrigerator Service of the American Refrigerator Transit Company.

Q. American Refrigerator Transit Company. Now, will you please tell the Court and jury what that company is [fol. 186] and the nature of its business undertaking?

A. The American Refrigerator Transit Company is a refrigerator-car company owned by Missouri Pacific and Wabash Railroads. Our business is to supply cars to those railroads and certain other railroads to protect their loading of perishable products. We also have charge—had charge, and still do—of protective service on certain lines, such as supplying the ice, ventilation service, heater service, keeping the records thereof, and other allied matters, all having to do with the protection of perishable traffic in transit. During that time, I had other positions. From 1911, to 1915, approximately, I had clerical positions, stenographical positions.

Q. I asked you how long you had lived in St. Louis; you said 1911, Mr. Friend. Is that the year you became associated with the A. R. T. Company?

A. Yes. I started with the A. R. T. Company in 1911.

Q. All right, sir. Now, when did you retire from active service with the A. R. T. Company?

A. May 1, 1958.

Q. You had about forty-seven years' service, then, with the company?

A. Yes, sir. Yes, sir.

[fol. 187] Q. During that period of time—I think you started to tell me this—did you hold various positions with the company?

A. Yes.

Q. And, if so, outline those for us in a general way.

A. From 1911 to the early part of 1915, I was a stenog-

rapher and held various clerical positions. From 1915 to the latter part of 1928, I was Chief Clerk, and later Assistant to the General Manager. It was on October 1, 1928, that I became Superintendent of Refrigerator Service. I was also, for a period of about thirty years, from 1928 to—the time I retired, a member of the National Perishable Freight Committee.

Q. What is that, in a general way?

A. National Perishable Freight Committee?

Q. Yes, sir.

A. It's a national organization that publishes the Perishable Protective Tariff and handles the rules, makes recommendations for the rules and charges on all perishable freight in the United States. It was created during World War I, and Tariff No. 1 became effective February 29, 1920. Tariff No. 18 is now in effect.

Q. Now, you are referring to "tariffs"; will you tell [fol. 188] the jury, if you will, in layman's language, what you mean by a "tariff"?

A. Well, a tariff of any kind is a publication by the railroads outlining the rules and certain regulations and the charges that they must make against the shipper for the transportation of freight over those rails, and those tariffs, of course, must be approved by the I. C. C. which means Interstate Commerce Commission.

Q. Yes, sir. Now, were you a member of that Freight Perishable Committee for a considerable period of time there?

A. Yes. I was a member from October 1928 to May 1, 1958, when I retired. I might add there, if you will allow me, right during the latter part of World War II, and for several years thereafter, there was a committee established for a while; it was a joint committee of the railroads and the U. S. Department of Agriculture, who made a number of tests in transit. I was a member of that committee. And one more: I was Assistant Secretary of the company for ten years before I retired.

Q. A. R. T. Company?

A. A. R. T. Company.

Q. Now, Mr. Friend, in the course of your connection [fol. 189] with the American Refrigerator Transit Com-

pany, have you had occasion to study the subject of refrigeration, especially in railroad cars, and have you become familiar with the matters relating to refrigerator cars, such as icing and the position of vents and the construction of them and so forth?

A. Yes, I have.

Mr. Sharpe: I have an exhibit here that I want to have marked, to show you, Mr. Friend. That is a general exhibit, Mr. Reporter.

(Whereupon the instrument referred to was marked for identification by the Court Reporter as "Defendant's Exhibit A.")

Mr. Sharpe: I don't intend to use it on any specific car; I just want to use it for demonstration purposes when we are talking about the car. We offer "Defendant's Exhibit A."

Mr. White: No objection, Your Honor.

Mr. Sharpe: Thank you.

(Whereupon "Defendant's Exhibit A" was received in evidence. Please refer to INDEX TO EXHIBITS for location of this instrument in this STATEMENT OF FACTS.)

[fol. 190]

By Mr. Sharpe:

Q. Now, Mr. Friend, in connection with this case and with these records, they have got a lot of statements in here about bunkers and vents and plugs and a number of other technical terms; I wonder if you could do this: perhaps you could stand up here and maybe I could hold this. Could you come down here and let's just use this to where the jury can see it so you can point out some of the main portions of a refrigerator car, and if you will, come over here by my side. Show us where the bunkers are on a refrigerator car, Mr. Friend.

A. At each end. At the end from the top to the bottom. There is a space which is shut off from the bottom balance of the car by this heading here we call the "bulkhead."

Q. Let's hold it as straight as we can.

A. In other words, this is solid, this piece is solid (indi-

eating), and here's your ice bunker (indicating), and here it shows the ice in place (indicating). It's, as though you were taking off the side of this car here and this side over here (indicating). And these bunkers run from 268 to 280 cubic feet per car, half of that in each end.

Q. Approximately how many pounds of ice will these bunkers hold, Mr. Friend?

[fol. 191] A. Per car, around 10,000 pounds. Some of them as high as eleven.

Q. Would that be roughly 5,500 pounds in each bunker?

A. In each bunker, yes. Here's the hatch on top (indicating).

Q. Let me ask you that question specifically so we can get it in the record. We've got a reference here to "hatches" sometimes and other times "vents" and other times "plugs"; now, will you show us what we mean by those terms and where they are located on the car?

A. They are on top of the car above these ice chambers. There's two on each end. This running board—I might first explain. You all—or most people—understand what is meant by the "running board." This running board, of course, runs from end to end on the roof of the car. And these hatches are on each side of that running board, two at each end (indicating).

Q. Are they adjustable?

A. Yes, they can be raised to allow ventilation. And in refrigeration, of course, they are closed.

Q. We use the terms "vents" and "plugs" sometimes; as a practical matter, are they separate or together?

A. Most of them are together.

[fol. 192] Q. Will you indicate on this diagram where the vents and plugs would be?

A. They would be right up here (indicating).

Q. Two on each end?

A. Yes.

Q. Now, will you just indicate the center door there to the jury?

A. The center door is here, half way from each end of the car. (indicating).

Q. All right. Well, I just wanted to show the jury especially the ice bunkers and the vents and plugs. Now, it

may be that a little later, Mr. Friend, I will ask you some more questions about that.

(Witness resumes the witness chair) I will ask you first if a refrigerator car used for carrying perishable commodities such as honeydews and peppers is designed or so constructed that the temperature would be controlled, and especially to lower the temperature inside the car compared to that with the outside air?

A. That is the whole purpose of a refrigerator car. The car is insulated in the walls to slow down the travel of heat from the outside, just as your refrigerator in your home is insulated. Then these ice chambers at each end [fol. 193] are there for the purpose of adding ice (indicating). Ice makes refrigeration. That is, the melting of the ice is what makes your refrigeration. That is the purpose of the refrigerator car. But, if it were not for the icing to ventilate cars, you wouldn't have all this insulation. Many years ago there were cars without ice bunkers. They were just built for ventilation.

Q. I see. And although it's not involved in this case, in many instances you have shipments, such as onions, that are carried without icing?

A. We have many thousands of cars that move each year without ice, under ventilation. They open these vents so that the air can get in and out.

Q. All right, sir. Now, Mr. Friend, in your experience, have you made tests and do you know approximately how much a refrigerator car of a certain type would be designed to use as far as ice is concerned and where the regular icing stations are along the various carrier routes?

A. Yes. There is a publication by this National Perishable Freight Committee which publishes the icing stations along the route. As to ice, I don't know whether I understood your question there about how much ice they might take—

Q. Well, have you had any experience making tests along [fol. 194] that line?

A. Yes.

Q. Does ice tend to melt with the passage of time, especially where it's in refrigerator cars, where you have honeydews and peppers and other perishable commodities?

A. Yes.

Q. The protective service—and I will use that term to include the icing and the vents and the plugs, Mr. Friend—who dictates or orders or determines what type of service shall be furnished on a refrigerator car on a particular shipment?

A. The shipper.

Q. And are there various kinds of services that he can select that he can direct the railroad to furnish?

A. Yes. The Perishable Tariff has—I wouldn't know just how many, but perhaps a hundred different classes of service, starting with ventilation, which is no ice at all. He may ship with one icing only, initial icing, Rule 240. He may start with two icings, three and four. With standard icing—which is icing at all regular icing stations—he, in addition to that, can specify salt, if he wants to, certain percentage of salt, which is supposed to step up the meltage [fol. 195] and refrigeration. There are a hundred classes of service from which the shipper dictates what he thinks, in his opinion, will best protect his shipment.

Q. All right, sir. Let's take these shipments here one at a time, Mr. Friend, and I will ask you some specific questions about the protective service on them. I will hand you the papers in connection with Count I and I will hand you both the plaintiff's exhibits, with the bill of lading and diversions, and the defendant's exhibits, showing the running record. Now, you have looked at the railroad record in each of these counts before coming here to court, have you not, Mr. Friend?

A. Yes, sir.

Q. And I will ask you, in connection with Count I, which is a shipment of honeydew melons from Rio Grande City, Texas, to destination, to Chicago, what the papers there indicate as to the type of protective service that the shipper ordered?

A. He ordered standard refrigeration to destination.

Q. Now, what does that mean?

A. That means that the car will be reiced to capacity at all regular icing stations.

Q. All right. Now, will you take the summary there

of the icing on this car and, if you will, just read it off [fol. 196] to us. There are not very many items there?

A. Well, the car was initially iced at Rio Grande City on June 12th. It was reiced at Harlingen. Do you want the amounts?

Q. Yes.

A. Reiced at Harlingen at 5:30 a.m.

Q. What was the initial amount, Mr. Friend?

A. Ten thousand pounds.

Q. Now, was that bunker ice?

A. That's bunker capacity, yes.

Q. And then at Harlingen?

A. Harlingen, the next morning at 5:30 a.m., June 13, with 7,500 pounds. The next icing was at Houston at 8:00 p.m. that date with 7,500.

Q. All right, sir.

A. The next was at Lexa, Arkansas, 9:50 p.m. on the 14th, with 6,600 pounds. The next icing was at Dupo, 12:50 p.m. on June 15th with 3,300 pounds. And the next icing at Chicago on June 16th was at 2:05 p.m. with 3,400 pounds.

Q. All right, sir. Is that the complete icing record?

A. That is the complete icing record.

Q. All right. Now, Mr. Friend, based upon your experience and your knowledge of the icing stations, I will ask you if the shipper's instructions were followed in con-[fol. 197] nection with the icing of that car involved in Count I?

A. They were, yes.

Q. Was the amount of ice that was used there in any way above normal or excessive?

A. The icing was above normal for—that is, above most commodities. These honeydew melons were gassed? they are held inside the closed car for sometime after they are loaded. You have fairly hot weather, of course. You had a large amount of outside heat; that is the heat that was in the commodity when it was loaded. And then you have your heat of respiration of the commodity, itself. Any living plant, of course, gives off heat of respiration, just like a human body. So you had a terrific load here to carry; you had an enormous amount of heat to dissipate. It will be, even as you got up to Dupo, which was three days after ini-

tial icing, that that icing became—was reduced materially. For example, your Dupo icing was twenty-five hours, 3,300 pounds. Then you go to Chicago, about twenty-six hours and take 3,400 pounds. That is quite a reduction from what it was down the line here while the car was so hot.

Q. Mr. Friend, I want to be sure we understand each [fol. 198] other. What you are saying is, because of the conditions of this particular commodity and the amount of heat and so forth at origin, that heavy icings were required, are you not?

A. Yes, sir.

Q. Now, under the conditions of all those circumstances, do you consider that the amount of ice was excessive for the purpose that was to be accomplished?

A. No; I would expect this.

Q. It's fairly normal for a shipment of this kind when you start out with a dry car to use more ice for the first few icing stations, is it not?

A. Always.

Q. And for the amount of ice that is used up the way and at destination to be smaller than at the earlier stations?

A. Yes. For example, if you pre-ice a car, as we call it, very often the shipper will order a pre-iced car; that is, it will be pre-iced before loading, and, of course, that will cool the car off and partially cool the commodity off and, normally, it might dissipate five or six thousand pounds of ice before the car is ever waybilled and starts on its journey. In these cases, that wasn't done, so the load had to take its toll on the ice in transit.

[fol. 199] Q. All right, sir. Now, Mr. Friend, in connection with Count I, will you pick out the icing after the car left Rio Grande City that involved the greatest amount of ice, greatest number of pounds?

A. Well, both are even. Harlingen took 7,500 on the 13th; Houston took 7,500 at 8:00 p.m. that day.

Q. All right, sir. Now, what I want to ask you is this: 7500 pounds—ordinarily, does the ice in each bunker melt out about evenly, or is there same variation in them?

A. No; fairly evenly.

Q. Well, would you safely say that within pretty narrow limits when 7500 pounds was put in this car at Harlingen

and Houston the probabilities are that about 3750 pounds was put in each bunker?

A. Yes.

Q. All right, sir. Well, we'll go to Count II. I'll hand you the defendant's exhibits, as well as the plaintiff's exhibits, on Count II, and I will ask you first to tell the Court and the jury what the shipper's instructions were in regard to protective service and icing on Count II?

A. The shipper's instructions on the bill of lading were: "DRY CAR LOADED—STANDARD REFRIGERATION TO DESTINATION."

[fol. 200] Q. That would be just the same as the first car, would it not?

A. Yes. O

Q. Now, Mr. Friend, I omitted asking you one item on Count I. The record that you had there showed that the vents were closed and the plugs in all the way?

A: Yes.

Q. Is that customary on that type of a shipment?

A..To keep them closed?

Q. Yes.

A. Yes, it's customary. In fact, it's a provision of the tariff, that unless otherwise instructed, all the hatches, as we call them, or the vents and plugs—it's the same thing—will be kept closed when the car is under ice.

[fol. 206] Q. I'll ask you this, Mr. Friend: To what extent does the outside temperature have in connection with the inside temperature of a car and the amount of ice that it uses?

A. Well, the outside temperature manifestly has a bearing on the inside temperature, and that fluctuates according to the differential, difference between the inside and out. I would say normally in anything like warm weather, we would figure that it would take from 1500 pounds to a ton of ice a day, in a twenty-four-hour period, to offset the infiltration through the car walls.

Q. Up as much as around 200 pounds or a little less per hour?

A. No; one hundred. In other words, an empty car closed up and iced would take something like that per day:

[fol. 209]

Cross examination.

By Mr. White:

Q. Mr. Friend, you have testified the icing at Huntington on the second car was higher than normal; that is, it required more ice than normal. Isn't it possible— Now, I'm not asking you to state that it happened, but isn't it possible that one of the vents could have been opened or all of the vents could have been opened during that time?

A. May I have that run, please, sir?

Q. That's on No. 2.

A. This is Count No. 12. Well, they show the vents closed on arrival at Huntington, all the way. In fact, [fol. 210] all the way through. Vents and plugs or hatches were closed all the way through.

Q. That is what your records show?

A. Yes.

Q. Where were these records made?

A. These records are made by each of the original railroads, the original—

Q. Yes?

A. They would be made at the icing stations.

Q. In other words, that is the only place they check the vents and plugs to determine whether they are closed or open?

A. Yes, I would say that is substantially correct. When the car comes in to be iced, they will check that as a part of the icing service.

Q. And it's very easy and possible that those records are sometimes in error, is it not?

A. There can be error anywhere in the world, I suppose, but I have no reason to believe that these are in error.

Q. Well, now, those things do happen, do they not?

A. I would say from time to time. I'm not talking about this, now; I'm talking about all transactions, anywhere, of any kind, manifestly, error occurs.

Q. Well, I want to eliminate all transactions otherwise; [fol. 211] I'm talking about your railroad records as to the position of vents and plugs. It is not unwell, I wouldn't say "unusual," but it's not unheard of for a record to be in error?

A. I would agree that it's not unheard of, but let me say that it's so very rare as to be virtually non-existent.

Q. Well, isn't it a fact the last time that I saw you, it was in this courthouse some five years ago, you were testifying from a similar record and your testimony was that there was no defect in the vent record on that car and the next witness or representative of the Wabash Railroad gave us the record that there was a vent defect, from your record which covered the same time, and covered the entire route, the A. R. T. record showed a clear record?

Mr. Sharpe: If the Court please, we object to retrying some other case at some other time when the record, itself, is not before this jury here, and it would just require— In the first place, it's not material as to any specific instance. That would have to be determined in that lawsuit, whatever it was. I frankly don't remember it right now. I'm sure I'd remember it if it was tried, but we object [fol. 212] to it on the ground of lack of materiality, and in the absence of producing the record that he's talking about. They would be the best evidence of it.

The Court: Sustain the objection.

Mr. White: Beg your pardon?

The Court: Sustain the objection.

Mr. White: I'm just testing the witness's veracity and memory as to these records. I have him on Cross Examination, Your Honor. If he doesn't recall it, why, he can say so.

The Court: All right, I will let him answer to that extent.

Mr. Sharpe: Well, I'd like to reply, Your Honor. If he's asking for records, we insist they would be the best evidence, and we think the Court's ruling was right on it.

The Court: We'll let him answer to the extent if he recalls.

By Mr. White:

Q. Do you recall the occasion, Mr. Friend?

A. I recall the occasion, Mr. White, but I do not recall testifying that the vent record was clear all the way through and that it was subsequently developed that there [fol. 213] was an error, because my recollection of that case was that I was testifying only about the records on the Missouri Pacific Railroad, and you had representatives representing the other railroads who testified for their own account. Therefore, I would have been out of order in testifying for them when they were here. That is my recollection of that case.

Q. All right. Now, you state that you represent the A. R. T. Company, who actually owns these refrigerator cars?

A. Yes.

Q. You have those records in your possession for the transit and for the entire—for the entire transit, do you not?

A. No. Oh, no.

Q. You don't keep the record? You don't have access to the records for the transportation of your car through the entire transportation?

A. We have a record of the movement of the car, the car interchange from one railroad to the other, but we would have nothing on the protective service on the connecting lines.

Q. And you only maintain the protective service record while it's on the line of the Missouri Pacific; is that right?

[fol. 214] A. Well, we have the Missouri Pacific, Denver & Rio Grande, and some other short lines.

Q. When were the cars in this case built? Do you have those records?

A. Built?

Q. Yes.

A. No, I have nothing to show that.

Q. You don't have records as to when each of these cars were constructed, when each were originally built?

A. No.

Q. Do you know whether or not they were equipped with fans?

A. All equipped with fans, yes.

Q. All of these cars were equipped with fans?

A. Yes.

Q. What is your record as to the running of the fans in each case?

A. We do not record records on the operation of the fans because there is no tariff requirement that the operation of the fans be recorded. Our instructions are to operate these cars with fans on in all cases unless otherwise specified by the shipper.

Q. Your instructions from whom?

A. Yes.

[fol. 215] Q. Your instructions from whom?

A. Our own instructions to our forces.

Q. You don't know— You don't have any records as to whether or not the fans were maintained or kept running in any of the instances of these cars?

A. Yes; there are some records. We keep some records along the line, some cases where time will permit. It takes a good deal of time to check these.

Q. You don't have those records available here?

A. No, no.

Q. What is the purpose of the fan?

A. The purpose of the fan is to speed up the travel of air and give somewhat better refrigeration and more uniform distribution of the air through the car.

Q. That will spread the refrigeration faster through the car and will equalize it throughout the car, will it not?

A. Yes, it would. If I can use this (indicating "Defendant's Exhibit A"), if there's no objection?

Q. Not at all.

A. Aside from— Let me say this: I said a while ago you get refrigeration by the meltage of ice. Manifestly, if you speed up the air travel through the ice, make it go through more often, you should get some more and will get some more distribution. Prior to fans, let me say, [fol. 216] it wasn't uncommon for top and bottom tem-

peratures to spread six to eight degrees; sometimes more. With the operation of the fans, you've got a very—you come very close to an even temperature at the top and bottom. Now, looking at this thing ("Defendant's Exhibit A"), prior to fans, your refrigeration travel, your air travel, was just opposite of what it is with fans. Cold air is heavier than warm air. Your warm air would go through these openings in the ice chamber. As it came through, it would come over the ice and out the bottom. The fans operating is just the opposite. You see here, these fans, these are electric fans. This one is dropped down to show how they are located (indicating). This end shows them in place (indicating). The fan operation reverses that; pulls the air up through the ice and up and out over the top of the load and on the top of the load, and what used to be the vulnerable spot or the weaker spot is sometimes now the best spot in the car. That is the big advantage of the fan. They all have fans, all of these cars have fans.

Q. But you don't have the records as to whether the fan was kept on all the time?

A. They are not here.

[fol. 217] Q. Now, in the absence of the fan running, isn't it a fact that the top of the load will be, as you say, warmer or hotter than the bottom of the load?

A. It will be somewhat warmer if it stands any length of time, but let's take a car runs for—substantially for twelve hours, eighteen hours, whatever it may be; it tends to cool, if anything, the top of the load a little better than the bottom. When your car stops, you will go back to what we call "convexion"; you will get the opposite. So it just about equalizes.

Q. So if your fan is not operating, you revert back to your statement a while ago that you sometimes have a spread there of six to eight degrees?

A. Yes.

Q. And if you have— In that instance, the commodity in the top, being in a higher temperature, will have a tendency to either ripen or decay faster than that in the bottom, would it not?

A. If it were that way in length of time. I'd like to observe, however, Mr. White, I have been through all of

these files and, as I recall it, the destination inspection showed very good temperatures, fairly uniform temperatures.

Q. But you don't show the temperatures of the cars back [fol. 218] during the time they were in transit; that is the destination.

A. We have no recording device to show the temperature in transit.

Q. It's very logical, is it not, that if the fan would not be turned on at all in transit and you had one commodity or part of the load in the top of the car or say the top center of the car, that it would receive higher temperatures and be affected greater than that that would be on the bottom of the car?

A. If the fans hadn't operated for any great length of time, there would be that differential, yes, but our instructions are very firm, and I'm—my recollection is that all railroads have that—that the fans will be operated unless the shipper dictates to the contrary, all the time.

Q. How long does it take it— When you do turn the fans on, how long does it take to actually effect an equalization of temperature in the load?

A. That would be difficult to say, unless you knew what your spread was at the start of this operation.

Q. If the spread were, say, ten degrees, it wouldn't take it over, say, ten hours, would it?

A. Oh, longer than that.

Q. How long?

[fol. 219] A. Oh, twenty-four hours, perhaps. I haven't any evidence on that.

Q. That is, if the spread is as much as ten degrees?

A. Yes.

Q. But say if it were five degrees spread, it would take half that long, approximately?

A. Yes. I might say, a change in the circuit of the air is virtually instant. Once you turn those fans on, it's got to come out there.

Q. But none of these cars we have the record as to the fans?

A. I'm not sure.

Q. I think one or two of the destinations do?

A. I think the destination inspection shows the fans on.

Q. The Car No. 1 here shows the fans were on?

A. Yes. Now, let me see.

Q. I believe that is the only one.

A. I think perhaps that is right. It supports my statement that we do operate these fans in ON position unless told to do otherwise. They were put in for that purpose. We are going to use them; we have reason to use them. In other words, we wouldn't have spent about \$500 a car to put them in.

Q. Now, Mr. Friend, you made a remark about the fact [fol. 220] that these cars were not precooled; that is, that the commodity was not cooled before this gassing. Now, you understand that the melons have to be warm when they are gassed, do you not?

A. I understand that is the general practice, yes.

Q. And that is the general practice?

A. Yes.

Q. And that the icing is not put on these honeydew melons until after the gassing in the car has been allowed to clear out?

A. That is right. I'm not quarreling with what they do there; I'm merely pointing out that, since it's necessary to do that, then, of course, this commodity is going to be very warm, very hot.

Q. That is right.

A. Before you close it up and put in ice. And the pull on the ice is going to be terrific in such a car.

Q. And you wouldn't suggest they do it in any other car, would you?

A. Terrific! No, sir.

Mr. White: Pass the witness.

[fol. 221] Redirect examination.

By Mr. Sharpe:

Q. Mr. Friend, do the fans in these refrigerator cars run when the car is standing still?

A. No, sir, they do not.

Mr. Sharpe: We pass the witness.

Mr. White: No questions.

Mr. Sharpe: Thank you, Mr. Friend.

(Witness excused.)

HERBERT HULSE, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. Herbert Hulse.

Q. Where do you live, Mr. Hulse?

A. Long Island, New York.

Q. How long have you lived in the State of New York?

A. I have lived in the State of New York about two years.

Q. And what is your business or profession?

A. I am with the Railroad Perishable Inspection Agency. [fol. 222] My title is Special Representative. I work in a supervisory capacity with that company.

Q. How long have you been connected with the Railroad Perishable Inspection Agency?

A. About fourteen years.

Q. Now, Mr. Hulse, will you first tell the jury just what the nature of the business of the R. P. I. A. is, and in order to save repeating so many words, I am going to call it the R. P. I. A.? What is the nature of the business of the R. P. I. A.?

A. We inspect perishable commodities, mostly at destination, and establish the condition of those commodities at the delivery points.

Q. And what is the nature of the business organization of the R. P. I. A.? Who is it organized by and who supports it?

A. It's an organization that was organized by the Eastern carriers, principally, the Pennsylvania, New York Central, and about thirty different carriers in the Northeast part

of the United States, and the purpose of the organization was to make a uniform inspection for all of those carriers.

Q. Uniform inspection of commodities mainly being shipped in to Eastern points, but in some instances, being shipped out, too, I suppose?

[fol. 223] A. We do a limited amount of field work; that is, shipments at origin being loaded, but most of our work is at destination.

Q. All right, sir. Now, is the management and operation of the R. P. I. A. separate and independent of any railroad, or is it subject to the orders of any particular railroad?

A. Well, the management is subject to the orders of our Board of Directors, which is made up of one member from each of the—what we call “member carriers”; that is, carriers in the association.

Q. And the practical operation of the R. P. I. A., in making inspections at these Eastern destination points, how is the management part of that handled? Do the instructions come through the R. P. I. A. in its management, or someone else?

A. The instructions come entirely from the management of the R. P. I. A.

Q. In other words, insofar as the practical operation of the R. P. I. A. is concerned, it's an independent agency?

A. Yes, sir; it is.

Q. Now, Mr. Hulse, will you tell the Court and jury what schools or colleges you attended, what subjects you studied, [fol. 224] relating to horticulture, plant pathology, marketing, and so forth, and what degrees you hold?

A. I had one year at the State Institute of Applied Agriculture in Farmingdale, Long Island, and I had four years of schooling at the College of Agriculture, Cornell University. I have a Bachelor of Science degree from Cornell University. My major at that university was vegetable crops; my minor was agriculture marketing. I took courses in botany, plant physiology, entomology, and pathology.

Q. All right. Now, Mr. Hulse, will you tell us what year you first became—in what year you first became connected with the R. P. I. A.?

A. Between my senior and junior years at the University. I had one summer with the R. P. I. A. That was in 1946.

And in June of 1947, I started again with the R. P. I. A., and I have been with them ever since.

Q. What was the first position that you held with the R. P. I. A.?

A. Junior Inspector.

Q. Now, in that position, what, generally, were your duties?

A. Well, when I first started, I was working with senior inspectors and actually learning the business and how to [fol. 225] make perishable inspections.

Q. Mr. Hulse, it may be that you and I understand some of these matters involved in inspections at these destination points, perhaps some of the jurors do, too, but perhaps some of them haven't observed it. Tell us just a little bit of how one of these inspections works in one of the places at New York City.

A. Well, every inspection that's made, whether private or U. S. D. A., is a sample inspection; that is, a certain number of packages are taken, as a sample. They try to get them from various locations in the load.

Q. First of all, let's start with this premise: In most of those Eastern markets, we have two cars that went to Boston; are you familiar with the inspections at Boston, as well as Pittsburgh, New York, and all those points?

A. Yes.

Q. First of all, at each of those places—and since we've got two shipments going into Boston, we'll use that—it's not unusual to have a lot of railroad cars of shipments each day?

A. It's usual to have a large number each day, yes, sir.

Q. That is, especially during the season of the year [fol. 226] where fruits and vegetables are produced in the various sections of the country—Rio Grande Valley, California, and Florida?

A. We have a large number of cars on hand each year from different points. We hope we do.

Q. Now, when those railroad cars come in,—let's take Boston, since we have two shipments going there—what is the usual procedure as far as the R. P. I. A. is concerned, as far as making an inspection of that car?

A. Well, an R. P. I. A. inspector will go into the car, if the load is accessible—that is, if some of the load has been taken out so he can go into the car—and takes sample packages, opens them and examines the contents; makes a record of what he finds in the contents, and then writes his report from that record.

Q. All right, sir. Now, as a usual proposition, Mr. Hulse, it's very difficult to get into some of these railroad cars and to see anything more than just a very small portion of the load in it?

A. That is very common to only be able to get at what we call a "doorway" inspection. Some of these loads are very high, even—particularly, in recent years, with heavy loads; they are above the height of the door opening, so [fol. 227] your inspection is limited to the doorway.

Q. Now, then, I want to pick back up; I was asking you about your work as a junior inspector with the R. P. I. A. and you said you did that work for about how long?

A. Well, you're rated a junior inspector for two years, and then you're—

Q. Did you, during that period of time, work with senior inspectors in connection with examination of railroad cars and perishable commodities?

A. A good part of that time.

Q. And after your position as Junior Inspector, what position did you hold with the R. P. I. A.?

A. Senior Inspector.

Q. And for how long did you hold that title?

A. Well, I can't recall exactly. Shortly after I was a senior inspector at Washington, D. C., I went to West Virginia as District Inspector out there.

Q. All right. In what places were you stationed as a senior inspector?

A. Washington, D. C.

Q. When were you promoted to your present supervisory position?

A. Well, that occurred about two and-a-half years ago. [fol. 228]. Q. All right. And in that position have you had occasion to travel to the various Eastern markets—

including Boston and other places—in order to exercise your supervisory functions with the R. P. I. A.?

A. Yes, sir, I have been to all the terminals, in the R. P. I. A. terminals.

Q. Mr. Hulse, have you had occasion to make many examinations, yourself, as an inspector of commodities, such as honeydews and peppers?

A. Yes, sir, I have looked at a good many cars of both.

Q. Now, I want to take the papers that we have in evidence here, Mr. Hulse, and give them to you one at a time and especially ask you about some of these conditions that were found to exist at the destination points. Now, I will hand you the exhibits in connection with Count I of this case, which involved a shipment of honeydew melons from Rio Grande City, Texas, to Chicago, Illinois, in Car ART 35042, and I especially call your attention to the exhibit which is marked "Count I—P-5," which is the United States Department of Agriculture Destination Inspection certificate of this car at Chicago, Illinois, and ask you to refer to it there. Now, I have a copy of it here in the [fol. 229] file, Mr. Hulse, and I'll try to identify the place on that report that I am asking you about. Now, at the top of the United States Department of Agriculture inspection report at Chicago on the car involved in the first count, under "Condition of equipment," do you see: "Hatch covers closed, plugs in, ice in bunkers approximately one foot from top. Fan control lever in 'ON' position"? Do you see that?

A. Yes, sir.

Q. Now, skip from that paragraph down to where it says: "Condition of load," and I quote from the report: "Car partly unloaded; each end of car loaded to near doorway, eight layers, four rows, crosswise; vertical strips at corners of crates." Now, Mr. Hulse, you were in the courtroom this morning, I think, when Mr. Baker testified generally as to that method of loading; is that known by any particular name? Is there something to describe that or not?

A. That is known as a "Pierce" load.

Q. How do you spell that word?

A. That is P-i-e-r-c-e.

Q. Would you describe it generally for us?

A. Yes, sir, there are strips of wood, which are between each stack. First, a stack is readied, and then these Pierce strips are put in place against that stack. These are [fol. 230] loaded in four rows; they are tight together in the car with all of the air spaces at the side walls.

Q. At the side walls?

A. Yes, sir.

Q. I wonder if you would take a piece of chalk—and you can erase what's on there if you will—and show us that?

A. I am a very poor artist here. This is looking at the end of the car (indicating). Say you are standing in the center of the car and looking at the end. Now, these crates are loaded like that (indicating).

Q. After you get it drawn, Mr. Hulse, I want you to step aside just a minute and let us see it.

A. And then these are loaded directly over the top of the other and straight up, in straight-up stacks, until you get eight high—well, seven or eight high.

Q. Well, you don't need to draw them all. And the only air spaces, you say, are between the inside of the outer side of the cars and the crates, themselves?

A. Between the rows, yes, sir. See, these rows are tight, one to the other. Now, against this stack face is put a strip, which extends to the height of the load like that (indicating), in that position. And then at each side wall [fol. 231] is a completely different arrangement. It's sort of a triangular piece that goes against this wall and is so spaced that it goes pretty close to—against the crates here (indicating), and it is arranged so that the crates sit into a little corner there, that piece there (indicating). This is solid, of course (indicating). Then, on these Pierce units, is what we call a "little plank"; it's a little metal piece that goes between these rows. It's a thin metal, thinner than this piece of chalk here (indicating). It goes between the crates to keep these spacers from sliding off to the side. And then against this stack face (indicating), the next stack of containers is loaded. And then another.

These units are then positioned against that stack and so forth till you get to the doorway of the car.

Q. All right, thank you, Mr. Hulse. Now, the next notation on the United States Department of Agriculture report on the car involved in Count I is: "Condition of packs: Tight; excelsior in bottom of crates." Now, looking at the notations we have had there so far, is there anything to indicate to you that the load was out of line or out of ordinary in any way?

[fol. 232] A. No, sir, there is nothing in this report to show any sort of thing.

Q. It appears to be a tight through load, does it?

A. Well, the car is partly unloaded. When you say "through, tight load," we have a term that that means. That means that the crates are loaded all the way through the entire body of the car. These loads are what we call "divided" loads.

Q. Yes. Now, I notice there under, "Temperature of product: Stack nearest doorway: Top, forty-six; bottom, forty." What happens to temperatures in a railroad car of this type, Mr. Hulse, when the door is opened, and in that area?

A. Well, when you open the doors of a car, you have a change of air there, depending on how cold the air in the car is and how hot it is outside. Sometimes, that is a very big change, and we expect the commodity temperatures to start rising after that door has been opened, particularly in the top layer, because they have the heat— In other words, as you can see, when you get up high, you've got a lot of air space on the top of that load, so you get your biggest change in the top of the load, and you would expect the temperatures to start rising at the top.

Q. All right. What is the— What have the temperatures [fol. 233] shown on the car there?

A. Well, both of these temperatures are desirable; forty to forty-six is a very good temperature to hold honeydews at. I don't know how long this car's been opened or how much has been removed; the report doesn't show that.

Q. Yes, well, we have that on the record here as to when it arrived and so forth. Let me have the defendant's papers there.

A. Yes, sir.

Q. The record that's in evidence shows that this car was placed in the hold yard at Chicago on the 16th of June at 6:20 a.m. Now, the inspection on your U. S. D. A. report is June 18th at 1:30 p.m. That's more than two and-a-half days, isn't it, after the car arrived?

A. Yes, sir.

Q. All right.

A. I might add there, with the car standing still that long, even if the doors weren't open, you would get a rise in the temperature in the top layer. That is, the cold air would drop.

Q. That is especially true where the fans were not running?

A. Yes.

[fol. 234] Q. Although the reports in this case show that the fans here were on?

A. Yes, but the fans don't work unless the car is moving, because they work from the wheels.

Q. Now, going down further, from the U. S. D. A. report at Chicago on the car involved in Count I, Mr. Hulse, look under "Quality," where it says: "Grade defects average six per cent, mostly scars." Now, will you tell the Court and jury what is meant by "grade defects" in honeydew melons?

A. Well, grade defects are things that affect the melon, like, for example, scars. When they mean "scars," that is a field condition—growth or harvesting defects, that have scarred over. It's things that affect the appearance of the melon.

Q. Now, are you familiar with the fact that the United States Department of Agriculture has set up standards which allow what is called "tolerances" for grade defects?

A. Yes, sir.

Q. And do you know that in the case of U. S. No. 1s, that as much—

Mr. White: Just a minute, Your Honor. Would you ask—Instead of leading your witness there, I suggest that he ask him—

[fol. 235] Mr. Sharpe: Oh, well, we'll just offer it in evidence. Let's mark it, Mr. Reporter.

(Whereupon "Defendant's Exhibit No. B" was marked for identification by the Court Reporter.)

Mr. Sharpe: We offer in evidence "Defendant's Exhibit B," which is the United States Department of Agriculture Standards for Honeydew and Honeyball Melons.

Mr. White: Your Honor, we object to it for the apparent reason counsel intends to use it. He has a witness on the stand he hopes to qualify as an expert on these matters; I would suggest that he ask the witness if he is familiar with the tolerances and not give him the instrument from which he can now read the tolerances. If he is an expert and knows these tolerances; he ought to be able to testify without it.

Mr. Sharpe: That is exactly what I was doing.

The Court: Let's don't argue between counsel. All right, restate your question and then if there is an objection to the question, I'll pass on it.

By Mr. Sharpe:

Q. Mr. Hulse, do you know what the tolerance allowed by [fol. 236] the United States Department of Agriculture standard on honeydew melons is for grade defects?

A. Yes, sir.

Q. What is it?

A. Ten per cent.

Mr. White: I didn't get the answer.

Mr. Sharpe: "Ten per cent."

The Witness: Ten per cent.

By Mr. Sharpe:

Q. And I'll ask you, then, to look at the notation, then, on the United States Department of Agriculture inspection certificate on this car at Chicago involved in Count I, and ask you whether or not the grade defects as found there would be within the tolerance for that melon to grade U. S. 1?

A. Yes. Six per cent would be within tolerance.

Q. Yes. Four per cent less, wouldn't it?

A. Yes.

Q. Now, let's go a little bit further into the sampling process in order to determine these grade defects. Mr. Hulse, in a case like this, about how many of those melons would the inspector usually look at?

A. U. S. D. A. inspector?

Q. Yes.

A. I don't know what they'd look at at Chicago, but [fol. 237] speaking generally of what I've seen them look at at other places, they would probably look at two or three hundred melons, anyway.

Q. Three hundred?

A. That would be quite likely.

Q. And this percentage that's mentioned there, is that so many melons per a certain unit; that is, in terms of a count of melons, or is it percentage in a particular melon?

A. Is that six per cent scars, now, that you are speaking about?

Q. Yes.

A. That would be the overall percentage for everything that they had looked at.

Q. Well, that would be in terms, though, of six melons per one hundred?

A. Six melons per one hundred.

Q. By count?

A. Yes, sir.

Q. In other words, if the inspector looked at a hundred melons, he found six of them that had grade defects?

A. Yes. Or, if he looked at three hundred, then, he found eighteen.

Q. Yes. That is the way they arrive at the percentage?

A. Yes, sir.

[fol. 238] Q. Now, will you pass on down to— Well, first, look down there at "Grade"; do you see that on the U. S. D. A. report on this car involved in Count I?

A. Yes.

Q. It says: "Now fails to grade U. S. No. 1 only account discoloration and decay." Now, let's go back to "Condition"; it says: "Generally hard to firm." Is that a desirable situation for honeydews at a destination market such as Chicago?

A. Yes, that is the range that you would expect.

Q. And the next notation is: "white to cream color"; is that a good color as far as honeydews are concerned?

A. Both of those colors are acceptable colors on the market.

Q. What colors do you try to avoid or are undesirable to be sold on a market at Chicago, Mr. Hulse?

Mr. White: Your Honor, I'd like to take him on voir dire. Counsel hasn't qualified this witness as to his knowledge of honeydew melons.

The Court: All right, you may.

Mr. Sharpe: I thought I had.

By Mr. Sharpe:

Q. Have you had some experience in connection with the [fol. 239] inspection, classification, grading, decay, grade defects, and so forth, concerning honeydew melons, Mr. Hulse?

A. I have personally made a good many inspections of honeydew melons in cars and we follow the same general principles that any inspection service does; that is, we make our counts and derive our percentages from those counts.

Q. And would your knowledge of that subject even relate back to your college education?

A. To some extent, yes, sir.

Q. Now, in connection with the color of melons, what relationship does the color have to maturity of the melon?

Mr. White: Your Honor, I'd like to take the witness on voir dire.

The Court: You may do so.

Mr. Sharpe: Your Honor, why should he?

The Court: I have ruled that he may test his qualifications, Mr. Sharpe, as I gave you permission to do earlier on his witnesses.

Mr. Sharpe: Well, we except to the ruling of the Court. We think it's proper on Cross Examination.

By Mr. White:

Q. Mr. Hulse, how many cars of honeydew melons have you actually personally inspected?

[fol. 240] A. I couldn't give you the exact number of them.

Q. Well, would it be more than ten?

A. Oh, a good many more than ten.

Q. More than a hundred?

A. I would think so, yes, sir.

Q. Where were those inspections?

A. At Washington. I've looked at a few at New York, when I have been out on the piers, and I've worked a good deal on vacation relief work at various stations in the Northeast United States, and during that service I became—

Q. How long has it been since you inspected a carload of honeydew melons?

A. It's been about seven years.

Q. How long?

A. About seven years; that is, taking the inspection all the way through, myself, and made the inspection. I've been in a good many cars of honeydews with other inspectors, not too long ago.

Q. Have you ever grown honeydews?

A. I want to take that back again. I worked vacation relief the past two summers and I've looked at honeydews during that period.

Q. Have you ever grown any honeydew melons?

A. No, sir.

[fol. 241] Q. You state that you studied about honeydew melons in college; or did you? I didn't get your answer clear on that.

A. I studied fruits and vegetables, generally, in school, physiology of plants, and so forth.

Q. What did that study include?

A. Pardon me?

Q. Did it include the diseases of these plants?

A. Not the specific diseases that we are dealing with on honeydews, no, sir.

Q. Have you studied the diseases of these plants?

A. Well, I have learned to identify those diseases and I have read all the material, a good deal of the material, about those diseases and I feel I have a working knowledge of what they are.

Q. From experience.

A. From inspecting, looking at them, knowing how the diseases develop while the cars are on track and that sort of thing.

Q. But you haven't actually studied the diseases or made a study of them in any school or anything of that sort?

A. In school, no, sir.

Q. What you have learned has been just like the other witnesses here; it's been from your experience, then?

[fol. 242] A. Most of my knowledge of them are from destination inspection work, yes, and from literature that is available on the subject.

Q. Do you feel that you are qualified to testify as to what the desirable characteristics of honeydew melons are for salability?

A. I think I do know what they like on the market, yes, sir.

Q. You never sold them?

A. Never sold them.

Q. But you do feel like you've had enough experience to where you can identify the characteristics, such as color and defects and what not, that would affect the salability of the melon?

A. I feel like I know what they like on the market, yes, what moves out the best.

The Court: All right, we'll take a recess for ten or fifteen minutes.

(Whereupon at 3:18 p.m. a recess was taken, after which, at 3:32 p.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

The Court: All right, Mr. Sharpe.

[fol. 243] Direct examination (Continued).

By Mr. Sharpe:

Q. Now, Mr. Hulse, do you still have the United States Department of Agriculture destination inspection before you on the car involved in Count I of this case?

A. Yes, sir.

Q. I think the question I asked you was in regard to the color of the melon, is white or cream color a desirable color?

A. Both of those colors are very acceptable.

Q. What is an undesirable color or colors in honeydews at destination markets?

A. If you have too much green color, why, it's not as desirable as the white or cream color.

Q. Does green coloring in a honeydew melon in a destination market such as Chicago have any significance?

A. In the degree of ripeness, yes, sir.

Q. What is indicated by a melon that has a greenish tinge?

A. Not fully ripe.

Q. Now, the next notation that I want to call your attention to on this destination inspection certificate is this: "In most samples, one to four melons per crate, some none, average approximately fifteen per cent"—that would [fol. 244] be by count, wouldn't it, fifteen out of a hundred?

A. Yes, sir, it would.

Q. —"damaged by light to dark brown discoloration."—Now, what is being referred to there when they speak of "dark brown discoloration" and what is it as distinguished from decay or bruising, if the distinction can be made?

A. Well, light brown discoloration is actually a surface blemish of the melon. It's quite common to find that condition at destination markets, and we believe it's associated with immaturity. That is, if a melon is harvested a little bit immature during the grading and packing operation, it will get very slight abrasions, and then the surface will darken.

Q. Now, Mr. Hulse, the record of this car—that is, ART 35042—involved in Count I of this case is in evidence and will be before the jury, and it shows that this car traveled at all times with the vents closed and the plugs in on the car and at destination, the fan lever control was in the ON position, under instructions at standard refrigeration; that the car was reiced at every regular icing station, was inspected at Chicago on June 18, 1958, when that condition [fol. 245] of dark brown discoloration was found, fifteen per cent of the samples. Now, in your opinion, is that con-

dition of light to dark brown discoloration related or associated in any way with the railroad transportation of honeydew melons?

A. No, sir, it is not.

Q. What can it be related to, Mr. Halse?

A. Well, as I explained, we believe that it's associated with immature melons. The melons, during the harvesting and packing operation, if they are immature, they have kind of a rough feel to the surface.

Q. Well, the dark brown discoloration, then, could be related to something that happened before the honeydew melons were put on the railroad car; is that your testimony?

A. Yes, sir. A fully mature melon has a good, hard, tough rind to it; an immature melon is very slightly rough.

Q. And the next notation on the U. S. D. A. destination report of this car at Chicago, the one in Count I, is this: "In most samples none, some one or two melons per crate, average approximately three per cent decay, Bacterial Soft Rot, generally in advanced stages." Now, would you please [fol. 246] first tell the Court and jury what is meant, first, by "Bacterial Soft Rot," where it originates and where it can be found?

A. Bacterial Soft Rot is a decay of—it's common decay found in many fruits and vegetables. It's caused by an organism, bacterial organism, and it's of field origin. The bacteria are commonly found on plant debris and that sort of thing, and it develops when the conditions of temperature and moisture are ripe for the development, bacteria-wise. You find it very commonly at destination on a great many fruits and vegetables.

Q. Now, let me ask you, if you assume that a honeydew melon was inoculated or infected by some Bacterial Soft Rot at the time it was packed and put on a railroad car and was carried under the conditions that we have in evidence here in this case on the car in Count I, and arrives at Chicago after being shipped from Rio Grande City, where the temperature at the doorway, the stack nearest the doorway, was forty-six degrees Fahrenheit on the top, and on the bottom forty degrees, would those temperatures—and assuming further that the car had been reiced through the journey, would those temperatures tend to retard, as far

as it could be retarded, the development of Bacterial Soft Rot?

[fol. 247] A. Well, the temperatures we have here would be favorable to retard that decay, because the lower the temperature you have, the more you are going to retard the development of Soft Rot.

Q. But even at forty degrees or forty-six degrees, if you start out with a honeydew melon at Rio Grande City that had some Bacterial Soft Rot in it over a period of six days or so, would the percentage of decay tend to increase?

A. Yes, sir. The decay would become more noticeable during that period. That is, you might have an infection or an inoculation at shipment that just can't be seen, but during the transit period, particularly where you've got a car that, for part of its journey, was very warm, why, that decay can develop and become very noticeable and cause a softening and a sloughing off of tissue.

Q. Now, I want to ask you, Mr. Hulse, in regard to the handling of these honeydew melons at Rio Grande City as is shown by the evidence here. After the melon is harvested, the evidence shows that it's taken into the packing shed and it's processed there, melons are put into a crate and then put into railroad cars and gassed, and the temperatures are not reduced in that car until after the gassing [fol. 248] process is finished, when the car is finished. Now, what is that operation relationship with increasing the ripeness of a honeydew melon?

A. Well, it does increase the ripeness of a melon.

Q. And if a honeydew melon at that stage, when it's put into a railroad car, has some decay in it, of Bacterial Soft Rot decay, what does that process of keeping it at high temperatures there for several hours tend to do to the decay?

A. Well, that would favor the development of the decay. It would become very noticeable.

Q. Now, we have no inspection of the honeydew melons in Counts I, II, or III in this case, and we can't say from any written report how much decay was in those melons, but I'll ask you, Mr. Hulse, if you can express an opinion from your knowledge and experience and educational background as to where the decay shown in the honeydew mel-

ons involved in Count I originated and the cause of it? First of all, will you answer the question, can you express an opinion?

A. Yes, sir, I can.

Q. What is your opinion about that matter?

A. It's my opinion that the decay originated at shipping point, either during the harvesting or the packing operation, [fol. 249] and that the decay developed so that it was noticeable at destination.

Q. Now, sir, I want to ask you in connection with the U. S. D. A. inspection certificate of this car involved in Count I of the petition if there is any finding made concerning bruising of these melons in that report?

A. No, sir, there is no report of any bruising.

Q. None shown in that particular report?

A. No, sir.

Q. And then we come back again to the notation of "Grade" on this report; it says: "Now fails to grade U. S. No. 1"—that is the top grade for honeydews, isn't it?

A. Yes, sir.

Q. —"only account discoloration and decay." Do you see that?

A. Yes, sir.

Q. And you have just expressed your opinion as to the cause of both the discoloration and decay?

A. Yes, sir.

Q. Can you relate either one of them, Mr. Hulse, either the discoloration or decay, to railroad transportation under the conditions which have been shown to exist surrounding this car?

[fol. 250] A. No, sir.

Q. Now, does the R. P. I. A. make inspections at Chicago?

A. No, we do not.

[fol. 264] Q. In other words, both of these reports agree that the honeydew melons in this car involved in Count III were fairly good quality?

[fol. 265] A. Yes, sir.

Q. And continuing on, in the second paragraph of the R. P. I. A. report, it shows: "Thirty to forty per cent

"slightly rough areas, corky or netted, remainder smooth." Now, will you please tell the Court and jury what is meant by the "corky or netted" areas, Mr. Hulse?

A. Yes, sir. That is a growth condition. Some melons grow that way. They have a raised area on the surface which is sometimes referred to as "netting." It's a growth condition. Those thirty to forty per cent rough areas would be a quality factor.

Q. Well, does the fact that a honeydew melon shows corky or netted areas after it gets up to Boston and after being transported six or seven days on the railroad have anything to do with railroad transportation of that melon?

A. No. If you had thirty to forty per cent corky or netted areas at destination, you would have had the same at origin. In other words, it isn't something that is going to happen—

Q. In other words, you would end up with what you started with?

A. Yes.

Q. Can you express an opinion, then, that corky or [fol. 266] netted areas amount to something that existed prior to the transportation of honeydew melons by the railroad?

A. Yes, sir. Definitely.

Q. Now, sir, the other notation there by the "corky and netted" matters says: "slightly rough areas." Does that mean just what it says?

A. Yes. I think the "corky or netted" is explaining the rough areas. What they are trying to get on honeydews is a smooth rind all the way around, and corky or netted areas just detract a little from that.

Q. Now, the next notation in the R. P. I. A. report on the car involved in Count III is: "Three per cent light brown discolored areas"; would your testimony in regard to Count III be the same as it was to Count II?

A. Yes, sir, exactly.

Q. Does the existence of light brown discolored areas in a honeydew melon have anything to do with railroad transportation of it?

A. No, sir.

Q. The next notation in the R. P. I. A. report is: "Seven per cent soft ripe or soft areas." Now, will you tell the jury and the Court what causes a honeydew melon to [fol. 267] be soft ripe or have soft areas?

A. Well, that is just an advance in the ripeness of the melon. Honeydew melons, as they ripen, will go from hard to firm and eventually to a condition of soft, and when they say "soft areas," they mean that the blossom end of a honeydew will be the first to soften. That is, a honeydew doesn't soften the— The entire rind doesn't soften the same degree at the same time; it starts at the blossom end, and then eventually the whole melon becomes soft. It's simply an advance in the ripening process.

Q. Is that an inherent quality of honeydew melons?

A. Yes, sir.

Q. They ultimately are perishable, aren't they?

A. They will ripen to that extent.

Q. If given enough time, they will ripen and then decay?

A. Yes, sir.

Q. The next notation on the R. P. I. A. report is: "Six per cent soft with watery seed cavities, range zero to fifty"—no; "watery seed cavities." We'll stop right there. "Watery seed cavities"—what does that mean?

A. Well, this six per cent of the melons were soft. And, in addition, the seed cavity, in the center of the melon was watery; that is, the seeds were loose and the cavity [fol. 268] was watery.

Q. And does that condition have anything to do with railroad transportation of a honeydew melon, Mr. Hulse?

A. No, sir, it does not.

Q. Where would you say it started or developed?

A. Well, again, it's associated with ripeness. If you have melons that get that ripe, why, those seed cavities, seeds, become loose and watery.

Q. All right. Now, the next notation on the R. P. I. A. report is: "Six per cent normal contact pack bruising and range zero to twelve per cent, average one to two per cent soft rot decay in advanced stages." I will ask you about the bruising first.

A. I want to say, you skipped a line there.

Q. Oh, I'm sorry.

A. It's "Zero to fifty per cent full ripe, mostly fifteen to twenty per cent."

Q. I did. I'm sorry. "Range, zero to fifty per cent full ripe, mostly fifteen to twenty per cent, remainder firm to mostly hard ripe." Now, what's the significance of that "zero to fifty per cent full ripe," Mr. Hulse?

A. Well, it means you have a wide range in ripeness. But, more important than that, that amount of full ripe, [fol. 269] together with the amount of soft and the soft with watery seed cavities, put it together and you have a very ripe car of honeydew melons.

Q. Very ripe?

A. Too ripe, yes, sir.

Q. Now, in connection with the notation on "Six per cent normal contact pack bruising," would your testimony be the same on this count as it was on Count II?

A. Yes, sir, it would be.

Q. Can you associate normal contact pack bruising with the railroad transportation of a honeydew melon?

A. No, sir, it's not.

Q. Then the next notation in the R. P. I. A. report is: "Zero to twelve per cent, average one to two per cent soft rot decay in advanced stages." Now, you have testified a while ago in connection with the other count about Bacterial Soft Rot; is this expression that is used here any different?

A. No, sir. When he says "soft rot decay," that would be Bacterial Soft Rot.

Q. Is there any relationship, considering the record in this case, of a car that traveled under standard refrigeration, vents closed; plugs in, in accordance with the shipper's instructions—is there anything in that transportation condition that would cause you to believe that the soft rot decay was caused by the railroad transportation?

A. No, sir.

Q. Where did that soft rot decay originate, Mr. Hulse?

A. Well, again that is of field origin or packing-house origin. Melons are inoculated at shipping point.

Q. Now, the inspection report that I have just gone over there was of the inspection dated June 25, 1958; now, there

was a follow-up inspection on June 29, 1958, some three days later. Do you see that?

A. Yes, sir.

Q. And without just going into detail on each one of the conditions there, in some respects the shipment was worse, was it not, after the passage of four days?

A. Well, it's worse. I think the only thing that's really worse about it is the advance in decay. You have three per cent Bacterial Soft Rot decay, but the other factors stayed pretty much the same. I think that is pretty interesting to note, because honeydew melons store pretty well if you get the temperature down right; that is, if you get the temperature low enough, they hold up pretty good. And I think that this indicates—it does to me, anyway—that this [fol. 274] advance in ripeness and the decay, if you assume that the melons were good at shipping point, occurred early in the transportation period. After it gets at destination, it shows a certain amount of ripeness, and then—the 25th to the 29th—four days later that ripeness advanced very little.

[fol. 277] Q. Have you studied the general opportunities for inoculation and infection of organisms in peppers?

A. Well, the organism must have a point of entry to affect the produce. That is true of practically all fruits and vegetables.

[fol. 282] Cross examination.

By Mr. White:

Q. Mr. Hulse, do I understand your testimony, now, that nothing the railroad did or did not do in any one of these cars could have possibly contributed to any of the decay or defects at destination?

A. Yes, sir, that is right.

Q. In other words, your testimony is that nothing the railroad did or that they were supposed to do or that they did not do that they were supposed to do—

A. I didn't see anything that caused the conditions found.

Q. Beg your pardon?

A. I didn't see anything in the records that caused the conditions.

Q. That's not my question; my question is: Is it your testimony that there is nothing the railroad could have [fol. 283] done or failed to do that would have contributed to this decay or condition?

A. That they could have done or failed to do? Well, I don't know what else they could have done to protect the shipment. I looked at the records and saw nothing in there that would cause the conditions.

Q. Now, you have made your opinions here as to what caused the decays and conditions at destination without knowing what the temperature was at any point from the time that commodity left the point of origin until it got to destination; isn't that correct?

A. Well, we don't know what the temperatures are in transit, during the transit period, commodity temperature. No one has that information. That's no way of taking those temperatures.

Q. And you don't know whether or not the fans were kept on in these cars at any time, whether they were turned off or on?

A. Well, from looking at the records, I believe the fans were on in all of those cars. It indicates to me that they were.

Q. But there is no record to show whether they were on or off?

A. No, sir.

Q. Now, you have made your answers to Mr. Sharpe's question on the first car, which had to do with the car of melons at Chicago on the 18th, which the inspection was made without knowing what the temperature of that car was upon its arrival at Chicago on the 16th?

A. Yes, but I looked at the destination temperatures on the 18th and that tells you something.

Q. Now, do you know that the car was iced on the 16th in Chicago after it arrived in Chicago?

A. Wasn't that part of the record?

Q. It is, but did you take that into consideration?

A. When I looked at the record I didn't see any defect in the service, that I could see.

Q. But could you make an intelligent answer, render an intelligent answer, not knowing what the temperature of the car was when it arrived in Chicago?

A. I believe so, yes, sir, from the commodity temperatures that we had when the car was inspected on the 18th.

Q. Well, wouldn't it be very possible that the icing on the 16th and keeping of the car from the 16th over to the 18th would maintain—would bring the temperatures down and maintain that same percentage of decay over that period of time?

[fol. 285] A. Could I see the record on the Chicago car you are talking about? Now, you want me— Give me that question again. I want to look at these temperatures.

Q. To begin with, you do not know what the temperature of the car was when it arrived in Chicago?

A. Not until the time the inspection was made, that is right.

Q. Isn't it true that that car was iced on the 16th?

A. Yes, sir, I believe it was; let me check. I believe we've got two of our wrong records together here. That's Count IV of peppers.

Mr. Sharpe: Oh, yes, I'm sorry.

A. Yes, sir, the record shows it was iced on the 16th.

Q. On the 16th?

A. Yes, sir.

Q. Now, you state that on the 18th the temperature in the car was a good temperature for the keeping of melons?

A. Yes, sir, it was.

Q. And if that temperature had been brought about by the icing on the 16th and brought down to that temperature, then, it would have maintained the percentage of decay that had been in there, would it not?

[fol. 286] A. Well, I might not follow you exactly, but if the commodity temperatures on the 16th on arrival had been high,— You'll have to give me that question again, because I lost you a little bit there.

Q. Well, maybe I haven't made myself clear, but isn't it— You have stated, now, that the temperatures in the car at

the time the inspection was made were ideal temperatures for the keeping of melons?

A. Yes, sir, they are good temperatures for keeping melons.

Q. And you stated that you don't know what the temperatures, though, were on the 16th when the car arrived?

A. At no time until the car was opened and the inspection was made.

Q. You don't know whether that decay was in the car on the 16th or not?

A. No, sir, but I suspect that it was.

Q. You suspect that it was?

A. Yes, sir, I do.

Q. Because that temperature that was in the car now would maintain that?

A. Would hold it, maintain it, pretty well, yes. You may have a slight increase at those temperatures, but it would pretty well hold it and retard the development.

[fol. 287] Q. Now, would you examine the destination inspection on that car and show us what the percentage of normal pack bruising is?

A. Well, they haven't mentioned the pack bruising in this car.

Q. Well, that is a condition factor, is it not?

A. Bruising is a condition factor, yes, sir.

Q. And the government inspector would have discovered it if it had shown bruising, would he not?

A. No, sir. There's a great deal of that pack bruising that is not discovered either by the U. S. D. A. or R. P. I. A. or private inspectors. We see it in a great many cars and it's often not discovered.

Q. You mean that the United States Department of Agriculture inspector would not discover a factor that affects the condition of the car?

A. These small normal contact pack bruising, bruises, those small areas, no, they don't always discover those.

Q. What are the tolerances on bruising by the United States Department of Agriculture, according to their standards?

A. I couldn't tell you how big the spot has to be before they discover it, but I know that we get that condition and

[fol. 288] they don't mention it. Just like many other inspectors don't. That's normal, and they see it and it's very common.

Q. Is it your testimony, now, that you are not familiar now with the United States Department of Agriculture tolerances on U. S. 1 honeydews as to bruising?

A. I am generally familiar with those tolerances, yes, sir.

Q. What are the tolerances?

A. There's a ten per cent allowance for bruising or any other defect.

Q. Now, what's the total? In other words, what's the total defects?

A. Ten per cent.

Q. In other words, if there's six per cent bruising and four per cent other defects, that would reach the maximum tolerance?

A. That would be the extent of the allowable, but then, within all of those grades, you must understand that they don't discover every defect that affects the melon; that is, that it has to be damaged by that defect before it's scorable at all.

Q. Well, now, is it your testimony that this bruising does not damage the melon?

A. It's not damaged. Those small contact bruises don't [fol. 289] hurt them; no.

Q. You don't consider that they affect the salability of them?

A. No, sir, I don't.

Q. Would you examine that destination inspection prepared by the U. S. D. A. and see what it has to say as to the maturity of the melons?

A. They show the melons being generally hard to firm, white to creamy color. These are maturity factors, ripeness factors.

Q. Beg pardon?

A. They show them to be generally hard to firm, white to cream color.

Q. Read the quality part of the inspection.

A. "Mature, clean and well formed. Grade defects average six per cent, mostly scars."

Q. And it states that the melons are mature, does it not?

A. Yes, sir.

Q. Now, you have testified as to Bacterial Soft Rot and stated that that is an infection that takes place in the field or on the shed?

A. That is the origin of it, yes, sir.

Q. Isn't Bacterial Soft Rot ordinarily considered a transit disease?

[fol. 290] A. It's considered a transit disease from the standpoint that it develops in transit to the extent where it's notable, yes, sir.

Q. Now, isn't it also a fact—

A. I want to tell you the reason for that. Bacterial Soft Rot, if it's advanced to the standpoint—it's culled out at the packing shed. It's culled out if you can see it at origin.

Q. And isn't it a further fact that Bacterial Soft Rot is a bacteria that is in the ground and in the air everywhere?

A. It's in the plant debris, that type of thing.

Q. But isn't it actually a bacteria that is in the ground everywhere that any commodity is grown?

A. It's pretty well distributed. It's in the soil and it's in the wet areas.

Q. In other words, it can be acquired almost anywhere at any time?

A. I'm not going to go that far and say that. We find sometimes that it's a known fact that during rainy seasons that the bacterial organisms disseminated a great deal more; that is, it's spread around in the field a great deal more. In dry seasons, it isn't. That is a pretty general statement that it's floating around in the air all time.

[fol. 291] Q. Don't the records show in this case there was no rain and it was a dry season?

A. I don't think so.

Q. Well, it's in the records there introduced by the defendant.

Mr. Sharpe: The rain?

Mr. White: Yes.

Mr. Sharpe: I sure didn't notice it.

A. It says "heavy rains during this melon season."

By Mr. White:

Q. It says "no heavy rain," if you'll read it correctly.

A. Number Eight: "Heavy rains during this season."

Mr. Sharpe: Number Eight, and it says "heavy rains • during the season." Let's look at it.

A. You care to see that?

Mr. White: I think you've got that introduced.

Mr. Sharpe: I'd forgotten it.

By Mr. White:

Q. All right, Mr. Hulse, isn't it a fact, now, that Bacterial Soft Rot, even a commodity can be inoculated with it, and if it's submitted to the proper temperatures, keeping temperatures, that it will not advance?

A. Yes, sir, it will be retarded if the temperatures were [fol. 292] kept down.

Q. And isn't that the purpose of standard refrigeration?

A. That is one of the principal purposes, yes, sir, to keep those temperatures down.

Q. But, as you say, Bacterial Soft Rot is considered a transit disease?

A. Well, I want to repeat again, it's considered a transit disease because it becomes noticeable and discoverable during that transit period. It's a field-origin disease.

Q. Now, you have stated that, in your opinion, the decay started in each of these cars while it was in the field?

A. Yes, sir, during the packing and handling or shipping point.

Q. How do you reach that conclusion? You didn't actually see them?

A. No, sir, I didn't see them.

Q. Well, how do you reach that conclusion?

A. Well, from my knowledge of this disease.

Q. Well, by your knowledge, now, what you actually mean is that the bacteria could have come from the field or the shipping point?

A. Yes, sir.

Q. Now, isn't it a fact that any commodity grown—to [fol. 293] matatoes, cabbage, lettuce, carrots, anything of that

sort—is exposed to the Bacterial Soft Rot, by the mere fact that it's in the ground?

A. Bacterial Soft Rot affects all of those commodities that you have mentioned.

Q. And all of them will be subjected to it in the growing area?

A. If they have got inoculated at shipping point and the conditions are ripe for shipping, yes.

Q. Now, they can be inoculated, as you call it, and if they are kept properly with the proper temperatures in transit, it will not advance; is that not correct?

A. If you get the temperatures down low enough, early enough, you can retard the development of decay, yes, sir.

Q. How do you account for the difference in decay in the various cars here in this shipment in this suit?

A. Now, you want me to compare peppers with honeydews, take the whole ball of wax?

Q. Just talking about honeydew melons?

A. Just talking about honeydew melons. Well, I think it's— For one thing, they received different handling at shipping point. I'd like to examine all those records before I give you some of the things that might happen. [fol. 294] I'd like to see the transportation records there (records handed to the witness by counsel). Well, for example, you take Car ART 33450, finished the loading on the 31st and they released the car on the 1st; that is, it was loaded and shipped right away. That car went into Boston and showed no decay. I believe you have another one. I'll have to check the record a little closer—where you held it three or four days at shipping point, and showed some decay at destination. There is a difference in handling right there. There could be other differences; they could come from different fields; they could be held on the sheds, or took a longer time to pack them, longer time to gas them. I don't believe it's been brought out how many times they have gassed, or how long they have been held at hot temperatures at origin. There are so many different variables there that you have to take all those into consideration.

Q. Those variables differ as to the transportation of the commodity, also; it's not possible that the fans could be

off or vents could be off at sometime where the record doesn't show it?

A. The destination inspection indicates to me that the fans were on.

[fol. 295] Q. Because of the temperatures at destination?

A. Yes, sir.

Q. But you cannot say whether or not they were on all the time or what the temperatures were anytime in transit?

A. I don't believe anybody can say. There's no record kept of the fans being on or off, but I'd like to say this, that if the fans are on at destination, why, that certainly indicates that they were probably on all the way during the transit period. There would be no reason to turn them on and off during transit.

Q. The only record we have of the fans would be on the No. 1 car?

A. Well, I haven't looked at that portion of the record.

[fol. 303] Cross examination of Herbert Hulse (Continued).

By Mr. White:

Q. Mr. Hulse, you have stated that the organization for which you work is the Railroad Perishable Inspection Agency?

A. Yes.

Q. And that that is an agency of the railroads?

A. Yes, sir, it is.

Q. And the railroads provide the funds with which you are paid; is that not correct?

A. Yes, sir, that is correct.

Q. Now, how much experience or training do your inspectors have before they start inspecting?

A. They work with senior inspectors for a period of time until the senior inspectors or the supervisors feel they are qualified to go on their own, make inspections of their own.

Q. You feel that they are trained and qualified men before they start inspecting on their own, then?

A. Yes, sir.

Q. Now, I believe you also testified that it is not customary for the government inspectors, when they inspect—

[fol. 304] Incidentally, in that connection, are you familiar with the qualifications and training of the United States Department of Agriculture inspectors?

A. Not like I am our own people. I believe that they have certain minimum educational requirements. I don't know what they are. And then they go through a training period, too.

Q. Do you consider them as qualified inspectors?

A. Grade and condition inspectors, yes, sir.

Q. Now, you are talking about grade and condition, are you talking about quality and condition?

A. I am talking about an inspector that is qualified to make grade and condition inspections. They have some at Pittsburgh that are not grade and condition inspectors, but most of the U. S. D. A. inspectors, at points other than Pittsburgh, are qualified inspectors.

Q. Now, would you explain to the jury generally what the difference is between quality and condition factors?

A. Well, quality factors are factors that—such things as field defects, like scars and this netting that we have talked about, and that type of thing, that affect the quality of the melon. Condition factors are such things that might add [fol. 305] vance and cause breakdown, and that sort of thing.

Q. Well, it is generally true that quality factors do not change?

A. That is generally true, yes.

Q. In other words, a quality factor is the same at destination as it was at origin?

A. Yes, that is right.

Q. And condition factors do change?

A. Yes.

Q. Now, I believe you testified that it's not customary for the government inspectors to score bruising?

A. The government inspectors don't score the type of bruising that we have involved in these two counts of honeydews.

Q. I believe you have just refreshed yourself on the tolerances on honeydew melons as specified in the government specifications; as to tolerances on honeydew melons?

A. I just refreshed myself on the wording of how they handled the subject of bruising.

Q. What did you find there?

A. Well, I find that they score bruising when the melons are damaged by bruising. Now, on the last page of that, publication, they show that melons that show pressure [fol. 306] marks in packs shall not be considered damage by bruising. I think you could read that and say it better than I could, but they do score this damage by pressure as bruising.

Q. But it does state, "'Damage' means any injury or defect which *seriously* affects the appearance"—

A. —"materially affects the appearance"—it is cored.

Q. —"or the edible; or shipping quality"?

A. Yes, sir.

Q. Now, what, again, are the tolerance factors that you have with honeydew melons?

A. Well, for U. S. No. 1, it is ten per cent tolerance for all defects, of which not more than one per cent is decay.

Q. And anything that has more than one per cent, then, is thrown out of the—

A. Any lot that has an overall percentage above one per cent would be thrown out, yes.

Q. Now, how about No. 2 as to the tolerance on decay?

A. Tolerance on decay is the same in lower grades.

Q. So, if it has more than one per cent decay, it is out of grade for U. S. No. 2, is it not?

A. I'd like to see that grade just a moment.

Q. I think you have already stated now that you are familiar with these in detail?

[fol. 307] A. Yes, sir, but you are talking about a No. 2 honeydew melon. I don't believe that they have a No. 2 grade. Yes, they do; I'm sorry. U. S. Commercial and then No. 2. Well, the tolerance is the same for decay; it is one per cent.

Q. Now, you did testify yesterday in answer to Mr. Sharpe's question that you were familiar with these tolerances?

A. Generally familiar with the tolerances.

Q. Now, you state that you are just generally?

A. I stated yesterday that I am just generally familiar with them. I don't know every detail of the facets of those grades, but I am generally familiar with them.

Q. What is maturity? Where does it come in? Is it a quality factor or a condition factor?

A. Maturity is a condition factor.

Q. You say it is a condition factor?

A. In some types of produce, yes, sir.

Q. In honeydew melons?

A. Well, you say "maturity"—you're not speaking about ripeness?

Q. I'm talking about maturity. Isn't that the term used in this (indicating U. S. D. A. Standards, marked "Defendant's Exhibit B")?

[fol. 308] A. Well, maturity is where the melons come to fully mature. That would be a quality factor, but, then, the ripeness—which is sometimes referred to as "advance in maturity"—that is a condition factor.

Q. But maturity is a quality factor, is it not?

A. Yes.

Q. As a matter of fact, it's shown on this government inspection as a quality factor, is it not?

A. Yes, sir, it is.

Q. That is the government inspection in Count I. Now, it is also shown as a— Your R. P. I. A. inspections don't classify or don't separate quality and condition, do they?

A. Yes, sir, we generally do.

Q. Well, there you have the Railroad inspection there on Count II, do you not?

A. Yes, sir.

Q. Now, is—

A. Well, generally, when we are writing our reports, we write the quality factors first and condition as the last portion of it.

Q. Now, what did you show there as to quality, as to maturity of those melons?

A. We show them as mature.

Q. As a matter of fact, every inspection that we have [fol. 309] in these three cars, both Railroad, National Perishable, and government, shows these melons to be mature, do they not?

A. Yes, sir.

Q. Did you not testify yesterday that it was your belief that these brown, discolored areas were the result of the melons not being mature?

A. We believe that that is a factor in it, yes, sir.

Q. And yet your inspectors on each of these showed these to be matured melons?

A. Yes, that is true, but you've got to bear in mind that when they score this seven per cent light-brown discolored areas, they would take those melons out of their general description. That is, those are melons that's scored. They base their judgment on everything that is left, the remainder of the produce, and I think the government inspectors do the same thing.

Q. Is it your testimony now that they only score the good melons? I mean, that they only classify them?

A. They score these as light-brown discolored areas, but overall, the melons are generally mature, but, then, they show the specific percentage as being shown in this condition.

Q. Isn't it a fact that if they were going to show that [fol. 310] a certain percentage of them were not mature, they would specify there on the report that they were not mature?

A. Well, I have looked at a great many government certificates and I have never seen this scoring of immature melons. They practically all show them as mature.

Q. The reason for that is that they don't ship them until they are mature; isn't that correct?

A. They try not to ship them immature, but they get some immature ones in there.

Q. Is it your testimony that the government inspection there in Count I, that the government inspector, when he specified their quality, as to the whole car, that he was only saying that the melons that arrived in good condition were mature?

A. No; it's my testimony that overall, he thought the melons were mature, but he still showed seven per cent with this brown discoloration.

Q. And he showed that where, in which portion of the inspection?

A. "Condition."

Q. Condition factors do change, but quality factors do not change; is that right?

A. That is right.

[fol. 311] Q. What percentage of defects do you find in that government inspection, total percentage of defects?

A. As grade defects, average six per cent.

Q. Those are grade defects?

A. Grade defects, average six per cent.

Q. And, now, how about condition defects?

A. It has average of fifteen per cent damage by this light to dark brown discoloration, and he has an average of three per cent decay.

Q. The decay, alone, throws it out of grade for U. S. No. 1?

A. The decay, alone, yes, sir.

Q. And the discoloration would also affect it?

A. Either one would throw it out of U. S. No. 1 grade, yes, sir.

Q. Now, you have stated that you are familiar with these shipments of melons and that you are familiar with the markets generally and particularly these markets in Boston, and you have seen the market reports that we have referred to from time to time; I think you have one there, do you not?

A. Yes, sir.

[fol. 318] Q. Well, let's get back to my question, now. My question is, what if the temperature is allowed to go up in the car while it's in transit, what would be the effect of the melons?

A. Well, if you had an increase in the temperature, you would have an advance in ripeness.

Q. And what effect would it have on decay, for instance?

A. The same would be true, that if you had high temperatures, you would have the conditions—decay could much more readily develop.

[fol. 319] Q. Now, are you familiar with these fans that are used on these cars?

A. Generally, yes, sir.

Q. They are electrically operated, are they not?

A. Some of them are; some are mechanically operated.

Q. I think the illustration that we have here by Mr. Friend, those are electrically operated?

A. That was a P. F. E. car. Most of the P. F. E. cars have electrically operated fans.

Q. Well, to refresh your memory again, they are A. R. T. cars.

A. Well, you said the diagram. The diagram, I believe, was a P. F. E. car.

Q. That's not the one that Mr. Friend used, then.

A. He used that as an illustration. That was a P. F. E. car. That is in evidence. You can look at it.

Q. How do they work? How do these fans work?

A. Well, the fans are located at the top of the—

Q. I mean, mechanically? What makes them go?

A. Well, they have a wheel— Mechanically operated fans have a wheel that drops down on the wheel of the car when the fan is in ON position, and that turns the fan under the floor racks, or even a few cars, they have a cam that goes up to the top of the bunker wall and it's just a mechanical [fol. 320] operation that turns the fans. An electrical fan, why the wheel generates power, electrical power, which turns the fans. I am not much of an engineer, but it's an electrical proposition.

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Redirect examination.

By Mr. Sharpe:

Q. Mr. Hulse, I want to go back a moment to the questions that Mr. White asked you about the scoring of bruising, and I want to hand you the defendant's Exhibit B, which is the United States Department of Agriculture standards for honeydew and honeyball type melons. Now, will you first refer there to the subject of bruising, wherever you find it in there?

A. Well, I'll start with No. 1 "U. S. No. 1 shall consist of honeydew or honeyball type melons which are mature, firm, well formed, free from decay, and from damage."

Q. Is there a definition of "bruising" associated with damage there?

A. Yes, it says they must be free from damage caused by several other things mentioned, and one of them is "bruising." "Must be free from damage by bruising."

[fol. 321] Q. "Damage by bruising"?

A. Yes, sir.

Q. In other words, it doesn't say it should be free from bruising?

A. No, sir; free from damage by bruising.

Q. All right. Now, there is another place there—I think on the second page—which expands on that a little bit. Will you find that?

A. Yes, sir. It defines "damage," and it says: "'Damage' means any injury or defect which materially affects the appearance, or the edible, or shipping quality." And then it goes on to say: "The following blemishes shall not be considered as damage: (1) Slight bruising which is caused by the light pressure of the weight of other melons."

Q. That should not be considered damage, according to the U. S. D. A. standards?

A. No, sir, and they don't consider it.

Q. I think you testified yesterday that is something you do expect?

A. You do expect it.

Q. And it sort of gets down to what the individual inspector, looking at these melons, considers to be damage, doesn't it?

[fol. 322] A. Yes, sir.

Q. In some instances, there can be bruising and he won't score it, and others where he will score it, where he thinks there is damage from it?

A. If he feels that it affects the appearance of it, he will score it; otherwise, he will not.

Q. So you can have honeydew melons without it showing up on a report because it's not considered damage by the inspector?

A. Yes, sir.

[fol. 326] Q. All right. And in either of these cases here, any one of them, was an arbitration inspection requested either at Boston or Chicago?

A. No, sir, there was not. I'd like to mention a couple of things about honeydew melons in particular. That is, if

you have damage in the crate, it's not hidden damage; you can see without opening the crate. You can see every melon in that crate and it's a very easy thing for the consignee or an unloader or anyone, if he sees bruising, to set that crate aside.

[fol. 328] B. G. SLAY, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. B. G. Slay.

Q. Where do you live, Mr. Slay?

A. Harlingen, Texas.

Q. How long have you lived in Harlingen?

A. Fourteen years.

Q. What is your business or profession, Mr. Slay?

A. District Inspector of the Western Wing & Inspection Bureau.

Q. How long have you been connected with the Western Wing & Inspection Bureau?

A. Twenty-six years, in this particular time, this hitch.

Q. What is your title or position with Western, Mr. Slay?

A. District Inspector.

Q. And I will ask you to tell the Court and jury generally the nature of the business of the Western Wing & Inspection Bureau.

[fol. 329] A. Western Wing & Inspection Bureau is a freight-inspection bureau that is maintained by and for the railroads west of the Mississippi River.

Q. In the course of your business do you have occasion to examine fruits and vegetables and other commodities loaded in railroad-cars for the purpose of determining their quality and condition?

A. Yes, sir.

Q. How many years have you been doing that, Mr. Slay?

A. About twenty.

Q. And in the course of your association with Western Wing & Inspection Bureau, have you made a study of field conditions and growing conditions of fruits and vegetables in the Rio Grande Valley?

A. Yes, sir.

Q. And have you, yourself, made hundreds of inspections in the Rio Grande Valley of honeydew melons and peppers and other commodities grown here?

A. I wouldn't say they would run in the hundreds. Of course, I don't know how many, but destination, in the destination markets and in the Rio Grande Valley, I would say they would run into the hundreds; probably thousands.

Q. All right, sir. Now, I will ask you, in connection with the subject of honeydew melons, in particular, Mr. Slay, [fol. 330] we have three shipments involved in this case of honeydew melons from Rio Grande City, Texas, in June 1958. One shipment went to Chicago, and two shipments went to Boston, Massachusetts. Have you examined— Have I submitted to you the destination inspection reports in regard to these honeydew melons?

A. Yes, sir.

Q. The R. P. I. A. and the N. P. I. S.?

A. Yes, sir.

Q. And you are familiar with what they show?

A. Yes, sir.

Q. Now, I want to first ask you, Mr. Slay, about the maturity— Well, first, tell us how honeydew melons in the Rio Grande Valley are harvested and packed and what the ideal condition is, as far as maturity and ripeness are concerned, to be shipped?

A. They are harvested in bulk, brought in from the field in bulk, in a truck that has one side of the bed that is on hinges, which can be raised up. As it drives up to the shed, it's on an incline, with that side on the low side of the truck, it's unhinged and lifted up, and the melons pour out, then, onto a platform that also sits at an angle and probably half as wide as this courtroom, and they roll [fol. 331] down to the low side of this platform or this dump place there, and they all go onto a conveyor belt that takes them on into the shed and up over a system of rollers where each melon is turned over and over, so that the graders will have an opportunity to see any defect that it has and

grade it out. From there, then, after they grade it, they go down another belt into the bins where the packers are selecting the melons for packing. Now, you want to go further in that?

Q. Yes, well, we have gone through the rest of it. They are packed and then loaded on the railroad cars?

A. That is right. Then, after they are packed, the lids are applied to the cover. If it's a cover such as these containers here had—fiberboard, of course wouldn't have it, but then, they are picked up, as was explained by Mr. Baker, and carried into the cars with a clamp truck and loaded, then, one at a time, by the loader. He takes them off the stack as they are brought in and places them in position until the car is completely loaded and then it's braced out.

Q. All right. Mr. Slay, I want to ask you, first, before I get over to the question of maturity and ripeness, if at several stages that you have mentioned there,—harvest- [fol. 332] ing, the loading in the truck, the unloading, the processing, the packing and the placing of the crates into the railroad car—there is an opportunity that the melons might become bruised?

A. Yes, there is. In fact, several opportunities. It depends. There are different harvesting— Well, we'll confine our discussion to Elmore & Stahl's.

Q. Have you observed their operation over a period of years?

A. I have. The harvester goes in the field and harvests the fruit in what we call a "harvesting bag." Then the truck has a board that drags along behind. He walks up it. It has cross pieces on it and he puts them out in the truck. They are hauled into the shed in bulk. This truck would be, maybe thirty, thirty-six inches deep and six feet wide or maybe twelve or fourteen, sixteen feet long. I have never measured one of them. They are brought in there. Then there's a possibility, if a melon is fully matured at the time of harvest, of getting some bruising in that melon there. Then when they dump them out on the platform that goes down the conveyor that carries them into the shed, there's a possibility of bruising there. Then when the cover [fol. 333] is applied, there's another possibility. It's all along the way, but it's a commercial practice that is carried on all over the country, the same as is done here; you still have bruising.

Q. Is it difficult, Mr. Slay, at that early stage to determine the effects of bruising?

A. Yes, unless it was very severely bruised. A minor bruise would not show up on a hard melon,—which a honeydew melon is—with exception of the blossom end. When it's mature, the blossom end is soft, and it would necessitate cutting the melon to examine the tissue under the rind to determine if it was bruised, unless it was severely bruised.

Q. But, if a melon was lightly or moderately bruised by dropping it, that is something that could show up five or six or seven days later after the melon had been packed and after it had been carried in a railroad car, isn't it?

A. Well, bruising develops into a formation of liquid in the cells underneath the rind or the peel where the bruising is incurred. Now, the only time it would show up, then, would be to cut and examine the cells or the tissue. Now, after it becomes ripe, then, it is definitely and very pronounced and will show through the rind, such as honeydews. [fol. 334] It will show through, then, after they have become ripe, fully ripe.

Q. Now, let's get over to the question of maturity of honeydew melons when they are harvested, Mr. Slay. In what stage are they usually desirably harvested?

A. Well, when the melon is fully matured, it takes on a characteristic white-creamish color. That is, it's creamy, predominately white—predominately by white. At that stage of the game, the rind must be smooth as glass. When it's immature, when it's first formed on the vine, it has a ribby effect on the rind. The stem end stands out at a point, comes out to a point like. As it matures, this ribbiness disappears from the rind of the melon. The stem end formation comes out smooth, and the rind, then, will adopt a whitish-cream color.

Q. Now, what happens if— Well, first of all, let me ask you, will a honeydew melon still on the vine mature slowly or rapidly?

A. That depends on the condition of which it is— Say Rio Grande City conditions, it is a slow maturing melon; I think one of the slowest that we have. It does not mature and come out and pronounce itself mature such as cantaloupes will by netting. The only thing you can tell about is

[fol. 335] by the change of color and the rind formation becoming very smooth, just as smooth as glass.

Q. All right. Now, were you in the courtroom the other day, Mr. Slay, when Mr. Fillpot testified?

A. No, sir.

Q. Well, we'll go into the gassing problem, then. Are you familiar with the practice of applying ethylene gas to honeydew melons in railroad cars in the Rio Grande City area; as a matter of fact, at the Elmore & Stahl packing shed?

A. Yes, sir.

Q. What is the purpose of applying the gas to honeydew melons, Mr. Slay?

A. The gas hastens the ripening process. It advances it by removing the chlorophyll and increasing the rate of respiration at the time it's in there. In other words, you come out with a uniform ripening; that is something about plants that is not known why. For instance, a cluster of tomatoes that all bloom at the same time; there will be ten days to two weeks' variation at the time the tomatoes on it gets ripe. A bunch of bananas, all of them ripen the same time, yet half of them will be two weeks later in ripening. The benefit of honeydew melons is that you can get a uniform ripening at the time they are delivered to [fol. 336] the market.

Q. Now, what happens in this gassing process to the color, Mr. Slay?

A. It absorbs and removes the chlorophyll by increasing the rate of respiration.

Q. And what relationship does that have to the green which might be in a honeydew melon?

A. If the melon isn't fully matured, it will not remove it at all. The gas has no effect on an immature melon.

Q. You say if it is immature?

A. If it is immature. But if it is mature, it will develop the cream color.

Q. Now, is the sugar content of a honeydew melon an important factor?

A. Yes, it is very important.

Q. If an immature melon is subjected to this gassing process— Well, in any melon, is the sugar content changed by the gassing process?

A. Not at all. It only brings out the flavor which would make you think, maybe, that it had a lot of sugar, but it does not increase the sugar at all. If you have a melon that is showing seven per cent sugar and run it through the gas, you will have seven when the gassing period is over.

[fol. 337] Q. All right, sir. Now, Mr. Slay, it is in evidence here that the melons in this case—and generally, for that matter—were gassed in a railroad car which had not been iced; what, generally, is the temperature of the inside of a railroad car which hasn't been iced? What is the relationship to the outside temperature?

A. You mean a loaded railroad car?

Q. An unloaded one, first.

A. An empty one?

Q. Yes, sir.

A. If the doors are open, in all probability, you will have the same—and the vents open—you would have the same temperature in the inside as outside.

Q. Is it unusual for the temperature at Rio Grande City in the month of June to be over a hundred?

A. Well, it runs from ninety-five to a hundred and five, the maximum.

Q. And the evidence here shows that after the honeydew melons are processed and packed and placed in the railroad car, that it is closed up with the gas hose at the center of the car and for some period of time, depending on the judgment of the man who's putting the gas in there, it's applied; and then, the doors are opened, the car is aired out [fol. 338] and the man who applies the gas looks at the melons to see if, in his opinion, the color is all right, and he can only look at the ones right in the center of the car at a time, because it's fully loaded. Now, Mr. Slay, is there a possibility in that gassing process of using too much or too little or using too much time or too little time?

A. No, sir. Tests that have been conducted by the Science Department of Agriculture develop that you give it so much and it takes so much. They have found that in an airtight container forty parts per million was as effective as 1,000 parts per million;—it can only do so much—that any additional gassing had no effect on it at all. You are either going to get it the first time or you are not going to get it.

Q. All right. Then, suppose there is not enough gas applied for a sufficiently long time; what would be the effect there?

A. Not enough gas?

Q. Yes, sir.

A. Well, from what they brought out, that it takes forty parts per million, that's a very little bit, when two feet in a refrigerator car.

Q. Well, let's just ask you about the time element, [fol. 339] then. Suppose the gas were not applied for a sufficient length of time; will that affect the maturity of those melons?

A. No. The recommended time would be from twelve to eighteen hours, is what they found is best.

Q. That is for the gas to be applied?

A. Yes, keep them under gas. They are gassed and closed up from twelve to eighteen hours.

Q. All right. Now, at the end of that period, when the car is aired out and the man looks at them to determine whether the color suits him or not or looks at a few samples, what is the importance of that car being iced after that time?

A. To lower the temperature. This particular commodity is different from any of the others, in that it will not—its respiration rate will not increase, it will not start giving off heat when it's harvested like other commodities. The only way you can do it is with ethylene gas. When you take the gas from it, it begins to drop back down. What should be done when it's gassed is to get the gas out of there and then ice the car. They usually blow it out, which is the common practice all over the country, and then place the car under refrigeration to get the temperature down low enough to [fol. 340] prevent the development of your decays.

Q. All right, sir.

A. But, if we were to gas the car and—for eighteen hours—and if the color didn't suit him before, it's not going to suit him after eighteen hours, because it doesn't work that rapidly.

Q. Now, in one or two instances, Mr. Slay, we have destination inspections of these cantaloupes offered in evidence by the plaintiff here, which show that at destination—take

the car that's involved in Count II—show a pale whitish-green color in the honeydews. What does that indicate to you?

A. Immaturity.

Q. And that is some six or seven days after the car was shipped from Rio Grande City. The fact, you say, that there is some greenish color left in it—and in this case, it would be at Boston, after it had made the journey from Rio Grande City—would indicate to you that at the time the melons were loaded and gassed, that they were immature?

A. It does, because they should be whitish cream color to more white when they are harvested. That means that it is mature. A honeydew melon is not like a tomato, that when you pull it off of the vine, you can take it and put it [fol. 341] in storage and ripen it. Unless you gas it, like Mr. Baker said, if you don't gas them, you can hold them out there for a month, if they don't rot, with temperatures that will be favorable toward developing decays, but it will not ripen on its own, because it does not throw off any ethylene at all, like other commodities do.

Q. But the situation changes when the melons are gassed, does it not?

A. When the melons are gassed and they are mature, the color will come out.

Q. Now, the destination inspection report on this case in Count III has a notation—this is the inspection of the N. P. I. S., offered in evidence by the plaintiff—: "Most melons yellow, balance pale whitish green color." What do those colors indicate to you, Mr. Slay?

A. The "yellow" refers to yellow as cream, I suppose. It would indicate matured melons. The "whitish green" would be those that were not fully matured at the time of harvest.

Q. Do you know the difference between best and top quality melons, Mr. Slay? Is there any difference?

A. No, sir.

[fol. 347]

By Mr. Sharpe:

Q. In one of these cars, Mr. Slay,—I think it's Count I. Let me look at it to be sure. Yes. —the United States Department of Agriculture destination inspection at Chicago on the car involved in Count I shows damage by light to dark brown discoloration of the honeydews, some of which is sunken, occurring over one-eighth to one-half of the [fol. 348] "surface." Are you in a position to express an opinion as to the cause of that discoloration, Mr. Slay?

A. I don't know, unless it is immaturity. When these melons are immature, they are like every other fruit or vegetable: the epidermis or the outer skin is very tender and you touch them and they scurf up or break, and after a period of time in storage or any place else, that tissue dies and turns brown. Now, the description that he's giving there, I don't know whether that's it or not. That's the only thing that I have ever found, based on tests we have run at shipping point on it.

Mr. Sharpe: We pass the witness.

The Court: Let's take about a ten-minute recess.

(Whereupon at 10:10 a.m. a recess was taken, after which, at 10:25 a.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

Mr. Sharpe: Your Honor, I have one or two short questions I want to ask Mr. Slay before I pass him.

By Mr. Sharpe:

Q. Mr. Slay, you have testified that you are associated with the Western Wing & Inspection Bureau and I will [fol. 349] ask you if the Western Wing & Inspection Bureau makes inspections at Chicago, Illinois, for the carriers west of the Mississippi River?

A. We do. That is our general office location.

Q. Are you familiar with the practice procedure and have you been there many times?

A. Yes, sir.

Q. In connection with the car which is involved in Count I of this case—I'll hand them to you, the plaintiff's exhibits

on Count I in the case—you will notice that there is a United States Department of Agriculture inspection of that car in Chicago, which was made some two days after it arrived there; what is necessary to be done insofar as the Western Wing & Inspection Bureau at Chicago in order to get an inspection of a car of this type that was originally billed— What does the bill of lading show there?

A. Originally billed to St. Louis. You mean the destination?

Q. Yes. —and was re-consigned to Chicago for La Mantia Bros. Arrigo Company, and then the National Tea Company. Now, under those conditions, what would be necessary to get a Western Wing & Inspection Bureau [fol. 350] inspection of that car?

A. The National Tea Company and several other companies all over the country, we have an arrangement that when they find a condition in a shipment of perishables, they call us and we go out and make the inspection. In other words, we make them only on a call basis. When they find something that they attribute to the transportation handling and they call us and we go out, then, and make the inspection. We do not make inspections for grade, which this U. S. D. A. inspection here was made for; we are only concerned with the condition of the commodity, as it affects its value, or something that could be attributed to the handling in transit by the carriers.

Q. The papers in this case, either offered by the plaintiff or the defendant, do not show any request made for a W. W. I. B. inspection, Mr. Slay; can you think of any other reason why it wasn't made?

A. Well, that would be the only reason, under circumstances such as that. We wouldn't know the circumstances over there, because the National Tea is out quite a distance from where we are.

Mr. Sharpe: All right, we pass the witness.

[fol. 351]

Cross examination.

By Mr. White:

Q. The organization for which you work is an agency of the railroads?

A. The Western Railroads, yes, sir.

Q. The Western Railroads?

A. Yes, sir.

Q. Just as A. R. T., for which Mr. Friend works, is an agency of the railroad?

A. Yes, sir.

Q. And the agency for which Mr. Hulze works is an agency of the railroad?

A. That is correct.

Q. The Railroad Perishable Inspection Agency is the Eastern counterpart to the company for which you work?

A. Yes, I think they go north of the Mason-Dixon Line, and then across to the northeast. I don't know the outline of their territory.

Q. You are thoroughly familiar with their operation, are you not?

A. Nothing, other than in conversation with their men and reading their reports.

Q. You are thoroughly familiar with their reports?

[fol. 352] A. I think so, yes, sir.

Q. And are you familiar with their efficiency or whether or not their men are sufficiently trained?

A. Well, I'll say this, that all of them that I have met are very well qualified, Mr. White.

Q. Now, you say you have had an opportunity to examine these inspection reports made by the R. P. I. A.?

A. Four or five days ago, yes, sir.

Q. Let me show them to you; there are three here—Cars II, III, and IV. Now I wish you would examine the inspection of the car in Count No. II of honeydew melons. That inspector showed those melons to be mature, did he not?

A. Yes, I would say that he did; other than those that he took exceptions to. When we report—I think the R. P. I. A. has the same policy that we and the U. S. D. A.

has. If I go into a car and I can say good quality and color and maybe report ten per cent decay, I am not saying that the ten per cent decay is good quality; I'm talking about that that is not involved in the exceptions I took to the load.

Q. Now, let me understand you. Are you saying, then, that the part that you score as ten per cent decay, you don't consider good quality?

A. No, you wouldn't do that. You are only taking about [fol. 353] the remainder of the lading that you didn't take exceptions to.

Q. And it's your testimony that when you say ten per cent decay, for instance, that that ten per cent is not of good quality?

A. Sure, I would say it wasn't good quality. I may say—Here's what I said, was this: that in my general terms, the general description of the entire load may be "good quality." Now, then, I may say, though, follow it up with ten per cent decay. Well, I am talking about ninety per cent that is not involved in the decay; you don't class it. You are talking about—When you are describing the load, you've got to describe the balance of the load that you are not taking exception to.

Q. Now, you agree that quality factors do not change, do you not?

A. Yes, sir.

Q. And if the melon was of good quality at origin, it's good quality at destination?

A. Condition factors could throw it out, because if it gets soft ripe, then that is a condition that it would be overmature and we refer to it as "soft ripe," and that would be a condition factor. "Mature" means that it is mature [fol. 354] and in a marketable condition. But, now, then, if it's soft ripe, then, you wouldn't say that it was good quality, any more than you would if it was decayed, because a decayed melon or fruit and a soft ripe one are both worthless, you might say.

Q. And isn't it a fact that you have testified previously that condition had nothing to do with quality?

A. Oh, I don't think I testified in your words that way, but the condition and quality are two different factors. The quality are the factors that do not change. And the condition is the changing factor in it, such as soft ripe and decay, freezing damage, and so forth. Now, your quality factors deal with color, shape and formation.

Q. But haven't you testified, upon being asked this direct question, that sometimes an inspector will score a car as being poor quality because of condition?

A. I have heard and I have seen such reports as that, but it would be in error.

Q. And you state that that is incorrect and the R. P. I. A. does not do it as a general practice?

A. No, I don't say they don't do it; I say that I wouldn't do it, and we don't. Now, we may have a man that would slip up on it, but that is not our instructions, because we [fol. 355] are not concerned with that portion of the load that is in a deteriorated condition when we are trying to describe the balance of it and its general appearance. The reason for that is very simple: at destination where we have damage on a shipment, our inspector is establishing a basis of settling the damage. Now, if he went into a shipment and said it was good quality and condition, then, that shipment would be worth—I mean good quality—but that it was in an off condition of deteriorated condition, he is saying, then, that that shipment would be worth whatever the good-quality market was if it didn't have the condition. But, if he went in there and says, "good quality"—how did you word it? You said that I had said it before, but I don't remember ever saying it. You said, "good quality except for condition"?

Q. No; "poor quality because of condition."

A. "Poor quality because of condition" would be erroneous.

Q. All right. What do they show on that Car No. 2, in Count No. II, as to the color of the melons?

A. "Seven per cent light-brown discolored areas, remainder good color. Light cream. Hard ripe. Clean. Mature. Twelve to fifteen per cent small, corky areas, [fol. 356] remainder smooth. Four per cent normal contact pack bruising. No decay."

Q. Now, check this one on No. 3. What does the inspector say there as to maturity?

A. "Good color. Mostly full. Clean. Mature."

Q. That is good. Now, he stated it was good color and mature, did he not?

A. Yes, sir.

Q. Now, Mr. Sharpe has inferred on several occasions here—

A. He took quite a few exceptions to this, though. Go ahead; I'm sorry.

Q. They have been gone into. Mr. Sharpe has inferred on several questions to you and to Mr. Hulse that possibly these inspections are not representative because they don't check enough samples; is that your understanding of the R. P. I. A.'s inspection, that they are not representative of the car?

A. I don't know how many samples they take, Mr. White.

Q. Well, you are familiar with them and their manner of operation of business, are you not?

A. I know the procedure, but as to what the operation is, I know nothing. I have never been on the market with any of them, no.

Q. And you don't know— In your own mind, are you [fol. 357] satisfied that the R. P. I. A. inspector's findings are representative—

A. I think that—

Q. —of the car?

A. I think that he has satisfied himself that what he has seen represents the shipment, just like the U. S. D. A. and the other. At destination, some U. S. D. A. inspector may not look at but four or five crates, but he satisfies himself that when he takes these various portions from the load and they are running uniformly, the deterioration, the condition or the quality, then, he satisfies himself that that is representative of the load. I don't think that you could limit an inspector because your inspector should know what he's doing; he's got to look at ten, fifteen, or twenty-five, but where you have a varied percentage in your exceptions to a shipment, such as from zero to forty, then, you may come up with anything afterwards. So it

would be hard to establish an average under such circumstances.

Q. Now, Mr. Slay, you testified that you are familiar with the harvesting process of the honeydew melons in the Rio Grande City area; how do they actually determine maturity at the time of harvesting?

A. I don't know. I don't know how they determine it, [fol. 358] because there is quite a few immature melons, being shipped from Texas.

Q. You don't know how they actually determine that maturity?

A. No, because they bring too many green-colored melons into the sheds, all shippers do, for them to say that they are really picking mature melons. So, in view of that, I don't know how—I couldn't say how they do determine what it is, because they have entirely too many immature melons.

Q. But you testified you were thoroughly familiar with this harvesting procedure?

A. That is correct, but I didn't say about selecting in that harvesting procedure. You could go out and pull up the vines, themselves; that would be in the harvesting process.

Q. Isn't it true that the way they do determine the maturity is that they actually test the melons for sugar content before they are harvested?

A. I don't know, if they do. We ran some tests and the tests varied all the way from six point four to eleven point eight (6.4 to 11.8). So there's quite a varied selection there, don't you think? A good melon, California shippers have told me, I'll admit, I think there's less known about a honey- [fol. 359] dew melon by everybody than any other commodity we have. California shippers tell me they want twelve to fourteen per cent sugar.

Q. I think you probably intend to restrict that, that you know less about honeydew melons—

A: No, I'm not talking about me; I'm talking about myself and everyone that I have talked to.

Q. You have stated you are familiar with this gassing procedure; have you ever gassed a car?

A. No; I have observed it.

Q. You have observed it?

A. Yes.

Q. How many times were you on the sheds and in the fields there in Rio Grande City in June of '58?

A. Oh, Mr. White, I don't know, but I am there two or three times a week every year. I don't know how many times in '58; about every other day, and sometimes, every day.

Q. Is it your suggestion that they should handle them differently than the way they do?

A. No. I think, as I testified, that is a universal practice. They do the same thing in California, where they are noted for shipping melons. But, I would add to that, that if I were shipping melons, I don't think I would dump them [fol. 360] out that way; I think I would handle them a little more carefully.

Q. Now, is it your testimony now that this bruising at destination is caused by the shipper?

A. No, I don't think I said that. I said it could be.

Q. Well, now, there's been a great deal of testimony from Mr. Sharpe of you—and he attempted to bring it out by other witnesses—that the shippers bruise these or could bruise these commodities—

Mr. Sharpe: We object to the form of the question as argumentative.

Q. —in the handling process.

Mr. White: Your Honor, I am just trying—

The Court: All right, go ahead.

Mr. White: I am just trying to understand Mr. Slay's testimony.

Mr. Sharpe: We object to counsel arguing with the witness and having a bunch of dependent clauses and phrases prior to his real question, Your Honor.

The Court: If the witness can answer the question, I'll let him.

A. I think my testimony was that a fully matured melon dropped any distance on a hard surface—now, even though they claim there's cushioning, it's usually an old, hard car-

[fol. 361] pet—you couldn't detect it until it got ripe, without cutting it. I'm talking about ripe, now, at destination, it would show through the rind. As to where it got it, you couldn't say it was done here. There is a possibility of it being done at shipping point. I didn't say that it was or that it wasn't; I said you couldn't detect it until it got ripe, without cutting it.

[fol. 364] Thursday, March 30, 1961, 11:30 A.M.

(In the Court's Chambers)

DEFENDANT'S OBJECTIONS CONCERNING JURY NOTE

Mr. Sharpe: I believe the record should show that at approximately 11:15 a.m. on this morning, which is the 30th of March, 1961, after the jury had started deliberating at about 9:00 a.m., the following question was sent in by the bailiff,—

The Court: You need not read that. The question will be kept and preserved.

Mr. Sharpe: I beg your pardon?

The Court: I say, the question will be preserved.

Mr. Sharpe: It's brief, Judge; I'd like to make the whole Bill. —as follows: Addressed to "Judge Phillips."

"Ref.:"—(R-e-f)—"Count I—Special Issue 5.

"If we answer 'no,'—('no' in quotations)—"do we find that it *was*"—('was' underlined)—"due to failure of carrier? What does 'no'—(in quotations)—"mean? Foreman"—(without any name).

And then, the Court then proposed to give the following answer to that question:

[fol. 365] "You are instructed that in regard to Count I, Special Issue No. 5, the burden of proof is on the carrier to prove that the worsened condition, if any, was not due to its negligence in part. If the carrier has proved by a preponderance of the evidence that the worsened condition, if any, was not, in part, due to its negligence, you will answer, 'It was not due to the failure of the carrier.' If the carrier has not so proved by a preponderance of the

evidence, you will answer, 'No.'—(in quotes). Signed "Hawthorne Phillips, Judge."

The defendant objects to the giving of the proposed instruction by the Court, for the following reasons:

I. Additional explanatory instruction in answer to said question is not required. The issue as now submitted and the proposed form of answer is correct in every respect and does not require explanation in order to enable the jury to understand the same.

II. The proposed instruction amounts to a general charge and affects not only Special Issue No. 5 of Count I, [fol. 366] but affects and will affect Special Issue No. 5 in connection with Counts II, III, and IV, as well, which are submitted in the same form, with only the difference as to the car in connection with the other three shipments.

III. The instruction as to the burden of proof is already placed in the issue as submitted and the additional instruction by the Court in regard to the burden of proof being on the carrier in connection with said Special Issue No. 5 of Count I constitutes an undue emphasis and leads the jury to believe that the defendant in this case has a stronger burden than it actually has.

IV. The giving of such written instruction to the jury at this time deprives the defendant of the valuable right of argument in connection with same. The record will show that this case was argued to the jury yesterday afternoon,—that is, on March 29, 1961—at which time the Court nor counsel had the instruction contained in the Charge or before them so that such matter could be argued to the jury, and the same cannot now be argued to the jury. In that [fol. 367] connection, counsel for defendant's position would have been different and considerably more would have been said about the issue if the written instruction now prepared to be given had been included in the Court's Charge.

V. When the issue—Special Issue No. 5 on Count I—was submitted to counsel for both parties for objection,

no objections were made, and in particular, there was no objection made by counsel for the plaintiff, and, as a result, there is a waiver of the objection that plaintiff could have made to its form and the changing of it at this time comes too late.

For all of those reasons, the defendant respectfully excepts to the ruling of the Court that the proposed written instruction shall be given.

Respectfully submitted,

Missouri Pacific Railroad Co., By: _____,
Attorney for Defendant.


[fol. 368] Reporter's Certificate to foregoing transcript
(omitted in printing).

[fol. 369a] [File endorsement omitted]

[fol. 370]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-1

(See opposite) 

County **I**

JUL 10 1940

80166-1

(Uniform Domestic Straight Bill of Lading, adopted by Carrier, an Official, Southern, Western and Illinois Classification Territories, March 14, 1932, as amended August 1, 1935, and June 15, 1941.) 1st Sheet



UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—
NOT NEGOTIABLE

Shipper's No. _____

Agent's No. _____

MISSOURI PACIFIC RAILROAD CO.

RECEIVED, subject to the classification and tariffs in effect on the date of the issue of this Bill of Lading.

At **RIO GRANDE CITY, TEXAS** **JUNE 22 1940** From **ELMORE & STAHL**

The property described herein, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to **ELMORE & STAHL**Destination **ST. LOUIS**State of **MISSOURI**

County of _____

Route **R. P.**

Delivering Carrier _____

Car Initial **A R T**Car No. **37042**

No. Pkg.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	Weight (Subject to Correction)	Class or Rate	Check Col.	Subject to Section 7 of conditions. If this shipment is to be delivered to the consignee without recourse on the consignee, the consignee shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.
600	CRTS. (FLY75) H. D. NELSON'S @ 46	29440			PR (Signature of Consignor.) If charges are to be prepaid, write or stamp here, "To be Prepaid." Received \$ _____ to apply in prepayment of the charges on the property described hereon. Agent or Carrier. Per _____ (The signature here acknowledges only the amount prepaid.) Charges Advanced:
	S L C & W				
	DRY CAR LOADED				
	STANDARD REFRIGERATION TO DESTINATION				

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____

ELMORE & STAHL

Shipper.

Per **Paul R. Kuehling**

Agent.

Permanent postoffice address of shipper **PHAROS, TEXAS**

370

LON. W. CUMMINS PRINTING CO., ST. LOUIS, MO.

[fol. 371]

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of

the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant

that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or

at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper in general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may

lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information

as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of

lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section, and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

[fol. 372]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-2

((See opposite) 13

DIVERSION ORDER
ELMORE AND STAHL

Pharr, Texas

File No.

Mr. **MCCARTY**

JUNE 13 195 **8**

Agent **MP** Ry. Co.

Confirming Telephone **Elversion**

PHARR, TEXAS

M 19

Please refer to car initial **ART** No. **35042** contents **HONEYDEWS**

shipped from **RIO GRANDE CITY, TEXAS** Date **JUNE 12** 195 **8**

billed to **ELMORE & STAHL, ST. LOUIS, MO. (MP)**

and change consignee and destination to read **LA MANTIA BROS. ARRIGO CO.**

CHICAGO, ILLINOIS

Route **MP IC**

Protect lowest one factor through rate. Please also take up promptly by wire so there will be no delay in forwarding the car to its destination. Carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions of uniform bill of lading.)

Special Instructions: **SERVICE AS BILLED-SHOW WEIGHT AS 30,000 LBS MINIMUM - RATE 1.51**

Received for the **M/10** Ry. Co.

at **1134 June 13** 195 **8**

By **[Signature]**

ELMORE AND STAHL

By **[Signature]**

MC 818173

372

SUBJECT

501666-


(2)

ct1
P-2

[fol. 373]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-4

(See opposite) 

✓

J





SOLD FOR
ACCOUNT OF ABOVE BY

DETACH ABOVE VOUCHER AT PERFORATION BEFORE DEPOSITING
LA MANTIA BROS. ARRIGO CO.
COMMISSION MERCHANTS

801666

28-30-32
SOUTH WATER MARKET
CHICAGO, ILL.
PHONE CANAL 8-8100



XXX

REC'D. **CMSTP** CAR NO. OR **ART 38042** FILE **170285** FOLIO **36750**
TRUCK LINE NUMBER NUMBER

628 98 HONEY DEWS - AVERAGE 2 27
180 @ 3 00 337 @ 2 25 1 @ 1 50
92 @ 1 25 18 @ .50

6 SHRUNK
6 EMPTY LEFT IN CAR

1423 75

OK 1
P-4

Govt INSPECTION CERTIFICATE ATTACHED

H78

REMARKS

INSPECTION
ICE

10 00

CHARGES

DEM.
UNLOADING
FREIGHT
CARTAGE
TRANS. TAX
COMMISSION

30 91
605 92
69 74
2 09
142 38

861 04

E. & O. E. NET PROCEEDS

562 71

60072


SALES OF ALL ITEMS SUBJECT TO PRICE CONTROL IN THIS ACCOUNTING ARE BELIEVED TO CONFORM TO OPA
REGULATION. WE RESERVE THE RIGHT TO REVISE WITHOUT PREJUDICE ANY AND ALL ACCOUNTINGS TO
CONFORM TO SUBSEQUENT CLARIFICATIONS AND INTERPRETATIONS OF THE OFFICE OF PRICE ADMINISTRATION.
UNITED STATES DEPARTMENT OF AGRICULTURE LICENSE NO. 568

373

[fol. 374]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-5

(See opposite) 

170285 (5) 801666

177

FORM PV-303
(1-1-57)

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
INSPECTION CERTIFICATE

I- 32289
I- 32289

ORIGINAL

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and is admissible as prima facie evidence in all cases of the United States. **WARNING:** Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any of such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

Market Chicago Date June 18, 1958 Hour 1:30 PMDS
To LaMantia Bros. Arrigo Co. Address Chicago, Illinois
(Applicant)
Shipper Not given Address Texas
Receiver LaMantia Bros. Arrigo Co. Address Chicago, Illinois

I certify that in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected, at the time and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said time and on said date were as stated below:

Car No. 3 ART Where National Tea Co. Siding
Truck License 35042 Kind Fan Refrigerator Inspected National Tea Co. Siding

Condition of equipment: Hatch covers closed, plugs in, ice in bunkers approximately 1 foot from top. Fan control lever in "ON" position.

Products inspected: HONEY DEW MELONS in crates labeled "E & S Brand Elmore and Stahl Distributed by Elmore and Stahl Pharr, Texas", stamped to denote size; 9's noted.

Condition of load: Car partly unloaded; each end of car loaded to near doorway, 8 layers, 4 rows, crosswise; vertical strips at corners of crates.

Condition of pack: Tight; excelsior in bottom of crates.

Temperature of products: Stack nearest doorway: Top 46°F.; Bottom 40°F.

ES 3406

Size: Fairly uniform sizing in crates.

Quality: Mature, clean and well formed. Grade defects average 6%, mostly scars.

Condition: Generally hard to firm; white to cream color. In most samples 1 to 4 melons per crate, some none, average approximately 15% damaged by light to dark brown discoloration, some of which is sunken, occurring over 1/8 to 1/2 of surface. In most samples none, some 1 or 2 melons per crate, average approximately 3% decay, Bacterial Soft Rot, generally in advanced stages.

Grade: Now fails to grade U. S. No. 1 only account discoloration and decay.

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and is admissible as prima facie evidence in all courts of the United States. WARNING: Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any of such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

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 Shipper Not given (Applicant) Address Texas
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 Truck License ☐ 35042 Kind Fan Refrigerator inspected

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Products inspected: HONEY DEW MELONS in crates labeled "E & S Brand Elmore and Stahl Distributed by Elmore and Stahl Pharr, Texas", stamped to denote size; 9's noted.

Condition of load: Car partly unloaded; each end of car loaded to rear doorway, 8 layers, 4 rows, crosswise; vertical strips at corners of crates.

Condition of packs: Tight; excelsior in bottom of crates.

Temperature of product: Stack nearest doorway: Top 46°F.; Bottom 40 **ES 3406**

Size: Fairly uniform sizing in crates.

Quality: Mature, clean and well formed. Grade defects average 6%, mostly scars.

Condition: Generally hard to firm; white to cream color. In most samples 1 to 4 melons per crate, some none, average approximately 15% damaged by light to dark brown discoloration, some of which is sunken, occurring over 1/8 to 1/2 of surface. In most samples none, some 1 or 2 melons per crate, average approximately 3% decay, Bacterial Soft Rot, generally in advanced stages.

Grade: Now fails to grade U. S. No. 1 only account discoloration and decay.

Remarks: Inspection and certificate restricted to product in 1 complete stack each side of doorway and 2 upper layers in remainder of load in portion of load remaining in car at time of inspection.



Fee \$10.00
 Expenses _____
 Total _____

Sam J. Gennaro
 Sam J. Gennaro
 Room 1160 - 610 S. Canal St.
 Address Chicago 7, Illinois

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

[fol. 375]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

CHARGE OF THE COURT AND VERDICT OF THE JURY

CHARGE FILED: MARCH 29, 1961

VERDICT RECEIVED: MARCH 30, 1961

Ladies and Gentlemen of the Jury:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

Do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If anyone attempts to mention the case to you otherwise, you must report it to the Court at once.

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

[fol. 376] Do not discuss personal experiences and be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this

trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here, and from that alone."

Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way. Do not decide who you think should win and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

Keep these rules in mind at all times, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of this charge.

After you retire to consider your verdict, you will elect your own foreman. It is then his duty at once to read aloud, in the jury room, the first portion of this charge laying down the rules which you must obey. Listen to them again carefully at that time. After you have retired, if any juror starts to violate any of these rules, it is the duty of the other jurors to call his attention to the matter at once and [fol. 377] caution him. If any juror persists in such violation, or deliberately violates a rule, the other jurors should report the matter at once to the Court.

Definitions

The term "preponderance of the evidence," as used in this Charge, means the greater weight or degree of the credible evidence before you.

The term "inherent vice," as used in this Charge, means any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time.

The term "market value," as used in this Charge, means the amount of money for which an informed seller, willing but not forced to sell, and an informed buyer, willing but not forced to buy, would sell and buy commodities of the kind, quality and pack as the commodities involved herein.

By the term "negligence," as used in this Charge, is meant the failure to use ordinary care.

The term "ordinary care" may be defined as such care as a person of ordinary prudence would have exercised under the same or similar circumstances.

Count I

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 35042 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no."

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 35042 arrived at Chicago, Illinois, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count I

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no."

We, the jury, answer: Yes.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a [fol. 379] worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued in said Car ART 35042?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier.

Count I

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 35042 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "No".

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 35042 at the time of their delivery at Chicago, Illinois, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 380]

Count I

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 35042 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count I

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 35042 at Chicago, Illinois, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1423.75.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART

35042 at Chicago, Illinois, on June 18, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by [fol. 381] the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1920.00.

Count II

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 33450 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence, that when Car ART 33450 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car 33450 the defendant, and its connecting carriers, performed without negligence the [fol. 382] transportation services as provided by the terms and conditions of the bill of lading and as instructed by

the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no."

We, the jury, answer: No.

Count II

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found in answer to Special Issue No. 2 was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 33450?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found, in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport the care for the contents of Car ART 33450 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

[fol. 383] Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Count II

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 33450 at the time of their delivery, at Boston,

Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Count II

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 33450 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 384]

Count II

Special Issue No. 8

What do you find from a preponderance of the evidence to be reasonable market value of the honeydew melons loaded in Car ART 33450 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none."

We, the jury, answer: \$2736.25.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 33450 at Boston, Massachusetts, on June 9, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of

lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2985.75.

Count III

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 51395 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

[fol. 385] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 51395 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count III

Special Issue No: 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 51395 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters

not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Count III

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition if you have so found in answer to Special Issue No. 2, was not in any part caused by the [fol. 386] failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 51395?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 51395 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: No.

Count III

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 51395 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that

term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 387]

Count III

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 51395 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count III

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 51395 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1063.90.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 51395 at Boston, Massachusetts, on June 25, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's [fol. 388] instructions and the terms and conditions of the

bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1120.00.

Count IV

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the peppers shipped in Car ART 52223 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 52223 arrived at Indianapolis, Indiana, the peppers were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count IV

Special Issue No. 3

Do you find from a preponderance of the evidence that [fol. 389] as to peppers in Car ART 52223 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of Peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 62223?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier and its connecting carriers to transport and care for the contents of Car ART 52223 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no."

[fol. 390] We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the peppers in Car ART 52223 at the time of their delivery at Indianapolis, Indiana, was due solely to an inherent vice, as that term is herein defined, existing at the time the peppers were received by the carrier at Rio Grande City, Texas, for transportation?

Answer, "yes" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the peppers in Car ART 52223 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the peppers loaded in Car ART 52223 at Indianapolis, Indiana, at the time and in [fol. 391] the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1901.45.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the peppers in Car ART 52223 at Indianapolis, Indiana, on June 26, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none."

We, the jury, answer: \$2674.00.

After you retire to your jury room, you should select one of your members as your "Foreman." It is his duty:

1. To preside during your deliberations.

2. See that your deliberations are conducted with propriety.

3. Communicate with the Court In Writing on any matter requiring further instructions or assistance. The Court will attempt to answer and give you further instructions on any questions of law, but you are the sole judges of the facts and the Court is not permitted to answer any questions which would constitute a comment on the evidence or tend to advise you which way to answer a particular Special Issue.

4. Vote upon each issue in order and do not try to determine who should win or lose the case and then answer the issues accordingly.

[fol. 392] 5. Write your answers to the issues in the spaces provided.

6. To certify to your verdict in the certificate attached to this page.

Your answers must be by unanimous vote. In voting upon your answers, you may do so orally, in writing, by show of the hands, or in any other fair manner convenient to you; but you must not reach a verdict by lot, chance nor trading upon your answers.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge, and he can only inquire if you have agreed upon a verdict.

When you have answered all of the foregoing questions as requested, and your Foreman has placed your answers in the spaces provided, you will advise the officer in charge at the door of the jury room that you have reached a verdict, whereupon you will return into court with your verdict.

Hawthorne Phillips, Judge Presiding.

We, the Jury, Have Answered the Above and Foregoing Special Issues as Herein Indicated, and Herewith Return Them Into Court as Our Verdict.

Donald C. Osborn, Foreman.

[File endorsement omitted]

[fol. 393]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

Number 34710-A

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT, MOTION TO DISREGARD
FINDINGS, MOTION FOR JUDGMENT NON OBSTANTE VERE-
DICTO AND MOTION TO REQUIRE REMITTITUR—Filed May
25, 1961

To the Honorable Judge of Said Court:

Now comes Missouri Pacific Railroad Company, defend-
ant in the above entitled and numbered cause, and files this
Motion for Judgment, Motion to Disregard Findings, Mo-
tion for Judgment Non Obstante Veredicto and Motion to
Require Remittitur, as follows:

I

Motion for Judgment on Count One

(a) The jury has found in response to that portion of the
verdict designated Count I, Special Issue Number 3 as
follows:

"... That as to the honeydew melons in Car ART
35042 the defendant; and its connecting carriers, per-
formed without negligence the transportation services
as provided by the terms and conditions of the bill of
lading and as instructed by the plaintiff and in a reason-
ably prudent manner as to matters not covered by the
bill of lading or the plaintiff's instructions."

[fol. 394] Such findings constitute a complete defense
herein to the cause of action asserted by Plaintiff in its
pleadings, and under the evidence and verdict herein. Plain-
tiff has elected to prosecute its case herein on the theory of
a prima facie case and has not alleged any specific acts or
omissions constituting negligence on the part of the car-
riers; neither does the verdict contain any specific finding

of negligence on the part of the carriers. There is no basis in the verdict or in ultimate facts established conclusively by the evidence for rendition of a judgment in favor of the Plaintiff and against the Defendant on Count I of this case. In particular, Rules 130 and 135 of the applicable Perishable Protective Tariffs which were in effect at the time of the shipment in question, copies of which were offered in evidence in this case, effectively prevent a judgment in favor of the Plaintiff, and relieve the carriers of liability herein, in the absence of specific findings of negligence and proximate cause.

(b) The jury has further found in response to that portion of the verdict designated Count I, Special Issue Number 4, as follows:

"... That the arrival of the honeydew melons in Car ART 35042 in a worsened condition, was not in part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042."

[fol. 395] Such a finding also constitutes a complete defense herein to the cause of action asserted in Plaintiff's Petition on Count I. Plaintiff expressly relied upon the bill of lading as the basis of its cause of action. The above mentioned finding by the jury effectively buttresses the finding made in answer to Special Issue No. 3 of Count I, and wipes out any possible recovery by Plaintiff based upon any alleged breach of the contract evidenced by the bill of lading.

There was no allegation, no evidence and no issue as to any other matters not covered by shipper's instructions or the bill of lading. The findings of the jury in answer to any of the other Special Issues relating to Count I do not, in any way, furnish any basis for rendition of judgment in favor of Plaintiff or against the carrier.

Wherefore, premises considered, Defendant prays that on Count I of the Petition judgment be entered that Plaintiff take nothing and that Defendant go hence with its costs without day.

II

Motion for Judgment on Count Two

(a) The jury has found in response to that portion of the verdict designated Count II, Special Issue Number 4, as follows:

"... That the arrival of honey dew melons in Car ART 33450 in a worsened condition was not in part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the [fol. 396] bill of lading issued on said car ART 35042."

Defendant says that such finding constitutes a complete defense herein to the cause of action asserted in Plaintiff's Petition on said Count II. Plaintiff expressly relied upon the bill of lading as the basis of its cause of action. The above-mentioned finding by the jury effectively eliminates any possible recovery by Plaintiff based upon any alleged breach of the contract evidenced by the bill of lading.

There was no allegation, no evidence and no issue as to any other matters not covered by shipper's instructions or the bill of lading. The findings of the jury in answer to any of the other Special Issues relating to Count II do not, in any way, furnish any basis for rendition of judgment in favor of Plaintiff or against the carriers.

Wherefore, premises considered, Defendant prays that on Count II of the Petition, judgment be entered that Plaintiff take nothing and that Defendant go hence with its costs without day.

III

Motion for Judgment on Count Three

Defendant moves the Court for judgment in its favor on Count Three of Plaintiff's Petition, for the following reasons:

(a) The finding of the jury in response to that portion of the verdict designated Count III, Special Issue Number 1, prevents a judgment in favor of Plaintiff on said Count

and requires entry of a judgment in favor of Defendant. Because the jury answered such Special Issue "No", Plaintiff has failed to establish that the honeydew melons shipped in Car ART 51395 were in such condition that, based upon [fol. 397] the orders given by the Plaintiff to the carrier for their transportation and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition. Plaintiff has relied herein upon allegations of a prima facie case, only, and has not alleged or secured jury findings of any specific acts of negligence on the part of the carriers. There is no other basis in the evidence or jury findings for a judgment in favor of Defendant in connection with the said count III.

Wherefore, premises considered, Defendant prays that on Count III of the Petition, judgment be rendered that Plaintiff take nothing and that Defendant go hence with its costs without day.

IV

Motion to Disregard Findings and for Judgment Non Obstante Veredicto

Defendant moves the Court to disregard the findings of the jury on the following Special Issues:

(a) On Count I the Court should disregard the findings on Special Issues Numbers 1, 2, 5, 6, 7 and 9.

(b) On Count II the Court should disregard the findings on Special Issues Numbers 1, 2, 3, 5, 6, 7 and 9.

(c) On Count III the Court should disregard the findings on Special Issues Numbers 2, 3, 5, 6, 7 and 9.

(d) On Count IV the Court should disregard the findings on Special Issues Numbers 1, 2, 3, 4, 5, 6, 7 and 9.

(e) Said enumerated findings should be disregarded for the following reasons:

(1) As to Special Issues Numbers 1 in Counts I, II and IV there is no evidence, or at least insufficient evidence, [fol. 398] to support the finding, or even raise the issue as

to whether the commodity shipped, in each instance, was in such condition that, based upon the orders given by the Plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition. As to the commodities involved in Counts I and II there was no inspection at origin by the United States Department of Agriculture, nor was there any testimony by any witness who could say that he actually saw such commodities at origin and knew the quality and condition of same, and there is, therefore, not even a scintilla of evidence to support the said jury findings as to condition of such commodities at origin. The findings on Count IV are more fully hereinafter mentioned at a later point in this motion and motion for remittitur.

(2) As to special Issues Number 2 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence, to support the findings, or even raise the issue as to whether the commodity shipped, in each instance, at destination was in worse condition than would reasonably have been anticipated based upon the condition in which it was at the time the bill of lading was signed, the orders given by the Plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier. This is particularly true as to Counts I, II and III because there was no competent evidence of the condition and quality of such commodities at origin, and therefore, no proper comparison could be drawn or made with the condition at destination, in each instance. As to Count IV the evidence conclusively shows that two different grades of [fol. 399] were involved (some U.S. #1 and some U.S. #2); that all of such Peppers were transported in the same car under the same conditions, but that at destination one lot (the alleged U.S. Lot #1) was in much worse condition than the other. Such undisputed evidence, offered by Plaintiff, conclusively shows that the condition at destination was caused by conditions existing at origin and by the inherent perishable nature and inherent vice of the commodity, and was not caused by Railroad handling, transportation or fault of the carriers.

(3) As to Special Issues Number 3 in Counts II and III, the findings of the Jury are immaterial and not controlling for the following reasons:

(A) On Count II and III the Jury found in answer to Special Issue Number 4, that the arrival of the commodities in a worsened condition, was not in any part caused by the failure of the carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on the cars involved. Such findings on said Special Issues Number 4 would render any finding under Special Issue Number 3, involving such matters, immaterial.

B. On Counts II, III and IV, there is no evidence or at least insufficient evidence to support the jury findings on Special Issue Number 3.

(4) As to Special Issue Number 4 in Count IV, there is no evidence, or at least insufficient evidence, to support the jury finding made thereon.

(5) As to Special Issues Number 5 in Counts I, II, III and IV, the pleadings and evidence did not raise any issue as to the failure of the carriers to transport and care for [fol. 400] the contents of the Cars involved in a reasonably prudent manner, in each instance, as to matters not covered by Plaintiff shipper's instruction and bill of lading. The findings on such Special Issues Number 5 of each Count are therefore, not controlling, are immaterial and should be disregarded.

(6) As to Special Issues Number 6 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence to support the jury findings thereon, the same are immaterial and not controlling and should be disregarded.

(7) As to Special Issues Number 7 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence to support the jury findings thereon, the same are immaterial and not controlling and should be disregarded.

(8) As to Special Issues Number 9 in Counts I, II, III and IV, the same should be disregarded for the following reasons:

A. As to Counts I, II and III, there is no evidence, or at least insufficient evidence to support said findings on Special Issue Number 9 because the condition in which the commodities, in each instance, should have arrived cannot and could not be ascertained because the condition of said commodities at origin was not established by competent evidence. In a preceding portion of this motion to disregard findings, Defendant has moved the Court to disregard, among others, the finding in answer to Special Issue Number 1 of Counts I, II and IV. When and if such action is taken the finding on Special Issue Number 9 of said Counts will be meaningless because there will then be no basis upon which the condition at destination, in each instance [fol. 401] stance could be or could have been ascertained.

B. As to Count IV the evidence conclusively shows that two different grades of Peppers were transported in the same car under the same conditions, but that at destination one lot (the alleged U.S. #1) was in much worse condition than the other. Such undisputed evidence, offered by Plaintiff, conclusively shows that the conditions at destination was caused by conditions existing at origin and by the inherent perishable nature and inherent vice of the commodity and was not caused by Railroad handling, transportation or fault of the Carriers.

C. The jury finding on Special Issue Number 9 of Count IV in the amount of \$2,574.00 is not supported by the evidence.

The U.S.D.A. market quotations show that on the date the car was due and available (6-25-58) the quotations on large peppers, which would cover the U.S. #1's in this case, was 3.00-3.50. There were no quotes which would cover the U.S. #2's. The car was not unloaded and sold until the next day (6-26-58) after arrival. On 6-26-58 the U.S.D.A. market quotations on large peppers was 3.00-3.25. Again, there were no quotes for the #2's. Mr. Ed Baker, the only witness for Plaintiff who attempted to testify about the alleged loss on this shipment, at several times during his testimony said that he could not testify as to market values of the particular shipment and that he was not qualified to give an opinion as to such market values. He did say that

U.S. #1 was a better grade of peppers than U.S. #2, and that U.S. #2's usually sold for about 50 cents a basket less than #1's.

[fol. 402] On the basis of the *high* U.S.D.A. quotation for 6-25-58 the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.50	1,568.00
U.S. #2's—252 at 3.00	756.00
	<hr/>
Total value	2,324.00
Sales	1,901.45
	<hr/>
Loss on such basis	422.55

On the basis of the low U.S.D.A. quotation for 6-25-58 the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.00	1,344.00
U.S. #2's—252 at 2.50	630.00
	<hr/>
Total value	1,974.00
Sales	1,901.45
	<hr/>
Loss, on such basis	72.55

On the basis of average prices, arrived at by calculation, the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.25	1,456.00
U.S. #2's—252 at 2.75	693.00
	<hr/>
Total value	2,149.00
Sales	1,901.45
	<hr/>
Loss, on such basis	247.55

Plaintiff's loss on Count IV under the verdict is the amount of \$772.55, the difference between \$2,674.00, found on Issue 9, and \$1,901.45, found on Issue 8). It is apparent

[fol. 403] that, on any theory, such award is excessive and is not supported by evidence.

Using the market quotations for 6-25-58, as hereinabove set out, the verdict is excessive on the high quotations by \$350.00, is excessive on the average quotations by \$525.00, and is excessive on the basis of the low quotations by \$700.00.

Furthermore, shipper is chargeable with the delay in unloading the car between 6-25-58 and 6-26-58. The U.S. D.A. quotation show there was a market decline of 25 cents between the two said dates. Such decline alone amounts to \$175.00.

It is therefore apparent that the Plaintiff's maximum recovery on Count IV, which can be supported by evidence is the amount of \$247.55, (\$422.55, high market loss, less \$175.00, 25 cent market decline loss caused by shipper). The same amount of \$247.55, representing Plaintiff's actual loss can be arrived at by calculating the value of the shipment of the high quotation of 6-26-58, less 50 cents for the U.S. #2's, which is the only possible evidence which can be used in such connection. Plaintiff's loss on an average market basis on 6-26-58 was \$160.05, which was brought about by failure to unload and sell on 6-25-58. Shipper's loss, using the low quotation of 6-26-58 was the same as on the preceding date, that is, \$72.55.

There is no basis whatsoever in the evidence which will support the jury award of \$772.55. On the basis of a value of \$2,674.00, as found by the jury, each and every basket of peppers in this shipment, including the U.S. #2's would be worth \$3.82. The highest quotes one either 6-25 or 6-26-58, was \$3.50 and the evidence was that U.S. #2's sold for 50 cents less than U.S. #1's, which might bring the top price. In addition, there was no specific relation- [fol. 404] ship shown between the shipment involved and any sale covered by the U.S.D.A. Quotations.

Defendant submits that the lowest amount it is entitled to have remitted on Count IV is \$525.00 (\$772.55 less \$247.55) leaving a recovery for Plaintiff on said Count IV of \$247.55. Actually, Defendant believes that the remittitur of a greater amount is justified under the record in this

case. A remittitur of \$700.00 (\$772.55 less \$72.55) would be justified on the basis of low U.S.D.A. market quotations.

Defendant respectfully moves the Court, after disregarding one or more of the issues on each count of the Petition, to render judgment non-obstante veredicto in favor of Defendant on each count of the Petition.

Conclusion and Prayer

Defendant respectfully submits that its Motions for Judgment should be granted; that the Court should disregard the findings mentioned in Defendant's motion to Disregard; that judgment non-obstante veredicto in favor of Defendant should be rendered; that, in any event, a remittitur on Count IV should be required.

Respectfully submitted,

Missouri Pacific Railroad Company, Defendant,
Sharpe and Hardy, Attorneys for Defendant, By
T. Gilbert Sharpe, Of Counsel.

[File endorsement omitted].

[fol. 405]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

MOTION FOR JUDGMENT—Filed June 2, 1961

To Said Honorable Court:

Now comes Elmore & Stahl, plaintiff in the above entitled and numbered cause, after the verdict of the jury had been returned and accepted by the Court; and makes this, plaintiff's Motion for Judgment on the jury verdict, and moves the Court to set this motion for hearing with due notice to all parties and attaches hereto the suggested judgment to be entered by the Court in accordance with the answers by the jury to the charge of the Court.

Wherefore, plaintiff prays that judgment be entered for the plaintiff in accordance with the jury verdict, and upon hearing hereof, that the attached judgment be approved and entered.

North, Blackmon & White; By Jack E. A. White,
Attorneys for Plaintiff.

[File endorsement omitted].

[fol. 406]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

ELMORE & STAHL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

JUDGMENT—June 2, 1961

On the 27th day of March, 1961, came on to be heard the above entitled and numbered cause, wherein Elmore & Stahl are plaintiffs and Missouri Pacific Railroad Company, a corporation, is defendant, and came the parties by their personal representatives and through their attorneys; all parties having announced ready for trial and said cause having duly reached its proper place upon the docket of said Court, and whereupon, this cause proceeded to trial before a jury of 12 good and lawful men and women, which jury was duly impanelled, selected and sworn; and the pleadings having been read, the evidence adduced; and after the plaintiff had rested, defendant moved for an instructed verdict, which motion was by the Court duly overruled; the charge of the Court made and arguments of counsel had, the jury retired to consider its verdict; and on the 30th day of March, 1961, returned the following verdict in the form of Special

Issues, which issues and the jury's verdict and responses thereto are as follows:

[fol. 407]

COUNT I

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 35042 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the Jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 35042 arrived at Chicago, Illinois, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 35042 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

[fol. 409]

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 35042, at the time of their delivery at Chicago, Illinois, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the Jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any, you have found in answer

to Special Issue No. 2, at destination of the honeydew melons in Car ART 35042 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 35042 at Chicago, Illinois, at the time and in the condition in which they actually arrived?

[fol. 410] Answer in Dollars and cents, if any, or "none".

We, the jury, answer: \$1423.75.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 35042 at Chicago, Illinois, on June 18, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1920.00.

COUNT II

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 33450 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been rea-

sonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 33450 arrived at Boston, Massachusetts, [fol. 411] the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "Yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car 33450 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 33450?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

[fol. 412]

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found, in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 33450 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 33450 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 33450 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

[fol. 413] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 33450 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2736.25.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 33450 at Boston, Massachusetts, on June 9, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2985.75.

COUNT III

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 51395 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 51395 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed,

the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 51395 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by [fol. 415] the terms and conditions of the bill of lading issued on said Car ART 51395?

Answer "It was not due to the failure of the carrier" or "No."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 51395 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer: "It was not due to the failure of the carrier" or "no."

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 51395 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no."

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to [fol. 416] Special Issue No. 2, at destination of the honeydew melons in Car ART 51395 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried-out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no."

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 51395 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1063.90.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 51395 at Boston, Massachusetts on June 25, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1120.00.

[fol. 417]

COUNT IV

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the peppers shipped in Car ART 52223 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 52223 arrived at Indianapolis, Indiana, the peppers were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you from a preponderance of the evidence that as to the peppers in Car ART 52223 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

[fol. 418] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 52223?

Answer "it was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier and its connecting carriers to transport and care for the contents of Car ART 52223 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "it was not due to the failure of the carrier", or "no".

We, the jury, answer: No.

[fol. 419]

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the peppers in Car ART 52223 at the time of their delivery at Indianapolis, Indiana, was due solely to an inherent vice, as that term is herein defined, existing at the time the peppers were received by the carrier at Rio Grande City, Texas for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the peppers in Car ART 52223 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the peppers loaded in Car ART 52223 at Indianapolis, Indiana, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1901.45.

[fol. 420]

Special Issue No. 9

What do you find from a preponderance of the evidence to be in the market value of the peppers in Car ART 52223 at Indianapolis, Indiana, on June 26, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a

reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2674.00.

All special issues having been answered by the jury, the verdict was accepted by all parties, received by the Court, and entered upon the minutes of the Court; the defendant again moved the Court for an instructed verdict and for a verdict non obstante veredicto, which motion was duly overruled by the Court, and thereafter the plaintiff moved the Court to enter judgment for the plaintiff upon the verdict, which motion was duly presented to the Court, and the Court being of the opinion that plaintiff's motion for judgment should be granted,

It is therefore Ordered, Adjudged and Decreed by the Court that the plaintiff, Elmore & Stahl, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the following sums:

Count I, Car ART 35042, the sum of Four Hundred Ninety-Six and 25/100 Dollars (\$496.25), plus interest from June 18, 1958 in the sum of Eighty-Four and 36/100 Dollars (\$84.36), making a total recovery for plaintiff in the sum of Five Hundred Eighty and [fol. 421] 61/100 Dollars (\$580.61).

Count II, Car No. ART 33450, the sum of Two Hundred Forty-Nine and 50/100 Dollars (\$249.50); plus interest from June 9, 1958 in the sum of Forty-Two and 75/100 Dollars (\$42.75), making a total recovery for plaintiff in the sum of \$292.25.

Count III, Car No. ART 51395, the sum of Fifty-Six and 10/100 Dollars (\$56.10), plus interest from June 25, 1958 in the sum of Nine Dollars Forty Cents (\$9.40), making a total recovery for plaintiff in the sum of Sixty-Five Dollars Fifty Cents (\$65.50).

Count IV, Car No. ART 52223, the sum of Seven Hundred Seventy-Two and 55/100 Dollars (\$772.55), plus interest from June 26, 1958 in the sum of One Hundred Thirty Dollars Ten Cents (\$130.10) making a total recovery for plaintiff in the sum of Nine Hundred Two and 65/100 Dollars (\$902.65).

It is, therefore, Ordered, Adjudged and Decreed that the plaintiff, Elmore & Stahl, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the total sum of One Thousand Eight Hundred Forty-One and 01/100 Dollars (\$1,841.01), with interest thereon from date of this judgment at the rate of 6% per annum until paid, together with all costs in this behalf expended, for all of which lgt execution issue.

To which judgment and ruling of the Court the defendant duly excepted and gave notice of appeal to the Court of Civil Appeals for the 4th Supreme Judicial District sitting at San Antonio, Texas.

Signed this 2nd day of June, 1961.

Hawthorne Phillips, Judge Presiding.

[fol. 422] [File endorsement omitted]

[fol. 423]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL
—Filed June 30, 1961

To the Honorable Judge of Said Court:

Now Comes Missouri Pacific Railroad Company, Defendant in the above entitled and numbered cause, with leave of Court, and files this its amended Motion for New Trial, alleging that the judgment of this Court rendered and entered on the 2nd day of June 1961, should be set aside and held for naught, and that Defendant be granted a new trial on each Count of Plaintiff's Petition for the following reasons:

I

The Court erred in failing to grant Defendant's Motion for Judgment on Counts I, II and III.

II.

The Court erred in failing to grant Defendant's Motion to Disregard Findings and for Judgment Non Obstante Veredicto.

III.

The Court erred in failing to grant Defendant's Motion for Remittitur or to reduce the amount of the judgment on Count IV of the Plaintiff's Petition.

IV.

The Court erred in rendering judgment against Defendant on each Count of Plaintiff's Petition.

V.

The judgment is contrary to the law on each Count of Plaintiff's Petition.

VI.

The judgment is not supported by and is contrary to the verdict on each Count of Plaintiff's Petition.

VII.

The judgment is not supported by the verdict and by facts established by undisputed evidence on each Count of Plaintiff's Petition.

VIII.

The jury findings mentioned in Defendant's Motion to Disregard Findings are not supported by sufficient evidence.

IX.

There is no evidence to support the jury findings mentioned in Defendant's Motion to Disregard Findings.

X.

The error of the Court in giving the instruction which it gave in response to the question propounded by the jury

to the Court during the deliberations of the jury; said question particularly relating to Special Issue No. 4 of the Court's Charge.

XI.

The error of the Court in failing to grant Defendant's Motion for Directed Verdict and Judgment in its favor on each Count of Plaintiff's Petition at the close of Plaintiff's direct case.

[fol. 425]

XII.

The error of the Court in failing to grant Defendant's Motion for Directed Verdict and Judgment on each Count of Plaintiff's Petition, at the close of all the evidence and after both sides had closed.

XIII.

The error of the Court in granting Plaintiff's Motion for Judgment on each count of Plaintiff's Petition.

XIV.

The misconduct of the jury during its deliberations upon the verdict in this case.

XV.

The error of the Court in rendering Judgment for Plaintiff under a partnership name without identification of the partners who own said partnership.

Wherefore, Premises, Considered, Defendant prays that the said Judgment be set aside and that Defendant be granted a new trial herein, and for such other and further relief as may be proper in the premises.

Missouri Pacific Railroad Company, Defendant, By:
Sharpe and Hardy, its Attorneys, By: T. Gilbert
Sharpe, of Counsel, P.O. Box 767, Brownsville,
Texas.

[File endorsement omitted]

[fol. 426]

[File endorsement omitted]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

ELMORE & STAHL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR
NEW TRIAL—August 7, 1961.

On the 25th day of July, 1961, came on to be heard the Defendant's Amended Motion for New Trial in the above entitled and numbered cause; and it appearing to the Court that the said Motion has been duly and timely filed and was duly presented to the Court on July 25, 1961, and the decision of such motion was taken under advisement by the Court; and the Court after considering the said Amended Motion for New Trial, the pleadings, evidence and argument of counsel, is of the opinion on this the 7th day of August, 1961, that the said motion should be overruled.

It Is Accordingly Ordered, Adjudged and Decreed by the Court that the Amended Motion for New Trial of Defendant, Missouri Pacific Railroad Company, be, and the same is overruled, to which ruling and order of the Court the Defendant then and there in open court duly excepted.

Signed for Entry this 7th day of August, 1961.

Hawthorne Phillips, Judge Presiding.

[fol. 427]

[File endorsement omitted]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

NOTICE OF APPEAL—Filed August 16, 1961

Now comes Missouri Pacific Railroad Company, the Defendant in the above entitled and numbered cause, and gives notice that it desires appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas from the Judgment of said Court rendered in said cause on the 2nd day of June, A.D. 1961, and from the Order of said Court overruling Defendant's Amended Motion for a New Trial in this cause rendered and entered on the 7th day of August, A.D. 1961.

Missouri Pacific Railroad Company, Defendant,
Sharpe and Hardy, Its Attorneys, By: T. Gilbert
Sharpe, Of Counsel.

[fol. 427a] [File endorsement omitted]

[fol. 428]

IN THE COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT SAN ANTONIO, TEXAS
Number 13,937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

v.

ELMORE & STAHL, Appellee.

Appeal from the District Court of Cameron County, Texas,
107th Judicial District of Texas

APPELLANT'S MOTION FOR REHEARING, INCLUDING MOTION
FOR FINDINGS OF FACT & CONCLUSIONS OF LAW
—Filed July 11, 1962

To Said Honorable Court:

Now comes Appellant in the above entitled and numbered cause and respectfully moves the Court to set aside the judgment of this Court, as well as the opinion therein, rendered on the 27th day of June, 1962, to the extent that the judgment of the trial court was affirmed, and to grant it a rehearing and reverse said trial court judgment for the following reasons:

SECTION ONE

I

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (a), reading as follows:

[fol. 429] "(a) The jury finding on Special Issue Number Three establishing that the carriers performed

without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss."

II

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (b), reading as follows:

"(b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute a part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence."

III

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (c), reading as follows:

"(c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage."

[fol. 430]

IV

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (d), reading as follows:

- "(d) At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

V

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Two (a), reading as follows:

- "(a) There was no evidence, or, at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honeydew melons at origin."

VI

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Two (b), reading as follows:

- "(b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

VII

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Four (a), reading as follows:

- “(a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.”

VIII

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Four (b), reading as follows:

- “(b) The jury award is excessive.”

IX

The Court of Civil Appeals erred in holding, in connection with Count I, “under the above findings the carrier is liable unless it is able to show that the loss was due to one or more of the excepted causes, namely, (1) an act of God, (2) the public enemy, (3) the inherent nature or the qualities of the goods, or (4) the act or fault of the owner or shipper.”

X

The Court of Civil Appeals erred in holding that, in connection with Count I, the authorities relied upon by Appellant are not in point under the facts of this case.

XI

The Court of Civil Appeals erred in holding that “Appellant's first point of error, which is applicable to Count I of the petition, is to the effect that the finding of the jury, that the carrier performed the transportation services ordered by the shipper, without negligence, requires a judgment in its favor”; said statement being an incomplete and inaccurate statement of Appellant's contentions under Point One, and subdivisions (a), (b), (c) and (d) thereof.

[fol. 432]

XII

The Court of Civil Appeals erred, in connection with Count I of the case, in holding the jury found, in part, that "the worsened condition at destination was not caused solely by the shipper's instructions".

XIII

The Court of Civil Appeals erred in holding that, as to Count I, "Appellant made no attempt to show that the loss was due to one or more of the four excepted causes."

XIV

The Court of Civil Appeals erred in deciding Count I of this case contrary to federal law, particularly the Interstate Commerce Act, and the decisions of the federal courts in connection therewith.

XV

The Court of Civil Appeals erred in holding that, in connection with Count I, the trial court properly rendered judgment for Appellee on Count I for the sum of Four Hundred Ninety-six and 25/100 Dollars (\$496.25) together with interest from June 48, 1958.

XVI

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count I of this case.

XVII

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count II of this case.

XVIII

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count IV of this case.

[fol. 433]

SECTION TWO

Motion for Findings and Conclusions

Appellant respectfully requests this Honorable Court to make findings of fact and conclusions of law in connection with the material issues involved in this case as follows:

Count One

(Point One, Appellant's Brief)

I

The jury found in connection with Count I, Special Issue Number 3 (TR 18) as follows:

"Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?"

Answer "yes" or "no".

We, the jury, answer: Yes."

II

The jury found in connection with Count I, Special Issue Number 4, as follows: (TR 18-19).

"Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042, in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper [fol. 434] and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042?"

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier."

III

Rules 130 and 135 of the Perishable Protective Tariff No. 17, admitted in evidence herein (SF Vol. 2) are part of the contract between the shipper and the carriers in this case and are binding upon them.

IV

The responsibility of a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with perishable tariffs, including the said Rules 130 and 135 of the Perishable Protective Tariff.

V

The effect of the said Perishable Protective Tariff, and particularly Rules 130 and 135 thereof, when considered with the bill of lading is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.

VI

The jury finding on Special Issue Number Three establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill [fol. 435] of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss, or that the loss was due to (1) an act of God, (2) the public enemy, (3) the inherent nature or qualities of the goods, or (4) the act or fault of the shipper or owner.

VII

The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance

without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.

VIII

At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier.

Count Four

(Point Four, Appellant's Brief)

I

No market quotations were offered in evidence showing the market value of the peppers involved at the destination point.

II

The only testimony relating to market value of the peppers at destination was opinion evidence given by Mr. Ed Baker, Appellee's office manager.

III

Mr. Ed Baker did not see the peppers involved either at origin or destination.

IV

Mr. Ed Baker testified that he could not give an opinion as to what U.S. #1 peppers should have brought at destination because he did not know what the market was at that time at Indianapolis (SF 84).

V

The testimony ultimately given by Mr. Ed Baker as to what in his opinion the peppers should have brought at

Indianapolis was based solely upon the account of sales showing what the peppers in question sold for. (SF 85-86)

VI

The account of sales in this case, showing the amounts for which the peppers were sold at destination is incompetent to establish the reasonable cash market value on the date of its arrival at destination.

VII

The opinion evidence of Mr. Ed Baker based solely upon the price received for the peppers in question was inadmissible and not sufficient to establish market value of said peppers at destination.

VIII

There is no evidence to support the jury finding on Count IV, Special Issue Number 9 (TR 31).

[fol. 437]

IX

The Trial Court should have disregarded the answer of the jury to Count IV, Special Issue Number 9 (TR 31) in accordance with Appellant's motion requesting such action. (TR 37)

In connection with Section Two of this Motion, if this Honorable Court is not in agreement with the above suggested findings and conclusions, then Appellant respectfully requests of this Court to make the findings and conclusions which the Court deems proper relating to the same subject matter.

Wherefore, premises considered, Appellant prays that upon consideration of this Motion that this Honorable Court grant a re-hearing herein and that the former opinion and judgment of this Court be set aside and that the judgment of the Trial Court on Counts I, II and IV of the case be reversed and rendered in favor of Appellant or in any event that the case be remanded for new trial on such counts; and that the Court make the findings and conclu-

sions requested in Section Two of this Motion, and for such other and further relief as may be proper in the premises.

Missouri Pacific Railroad Company, Appellant.
Sharpe and Hardy, Its Attorneys, By: T. Gilbert

Sharpe and Hardy, Post Office Box 767, Brownsville, Texas.

Hutcheson, Taliaferro & Hutcheson, 1720 Esperson Building, Houston, Texas, Of Counsel.

[fol. 438] Certificate of mailing (omitted in printing).

[fol. 439]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 13,937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

ELMORE & STAHL, Appellee.

APPELLEE'S MOTION FOR REHEARING—Filed July 12, 1962

To Said Honorable Court:

Now comes Appellee in the above entitled and numbered cause, and respectfully moves the Court to set aside that portion of its judgment, rendered on the 27th day of June, 1962, which reversed and rendered the judgment of the trial Court as to Count III, and to grant Appellee a rehearing and to affirm said judgment as to Count III or, in the alternative, that the judgment as to Count III be remanded for a new trial and therefor says:

I.

The Court of Civil Appeals erred in holding that the jury's answer to Special Issue No. 1, on Count III, precluded a recovery by shipper.

II.

The Court of Civil Appeals erred in reversing and rendering the judgment of the trial Court because the findings of the jury would, at most warrant that the count be remanded for a new trial.

III.

The Court of Civil Appeals erred in taxing one-fourth of the court costs against Appellee.

Appellee respectfully prays that this Motion be granted and that the judgment of the court be in all things affirmed, or in the alternative, that Count III be reversed and remanded for a new trial.

North, Blackmon & White, By John C. North, Jr.,
419 North Tancahua Street, P. O. Box 2087, Corpus
Christi, Texas, Attorneys for Appellee.

[fol. 439a]

[File endorsement omitted]

[fol. 440]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS,
SAN ANTONIO

No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

v.

ELMORE & STAHL, Appellee.

Appeal from Cameron County.

OPINION ON MOTION FOR REHEARING—September 12, 1962

Our original opinion, filed June 27, 1962, is withdrawn and this opinion substituted in its place.

This suit was instituted by Elmore & Stahl as shipper against Missouri Pacific Railroad Company as carrier,

for alleged damages to four shipments, three of which were of honeydew melons originating at Rio Grande City, Texas, and one of green peppers originating at Pharr, Texas; with destination points of the melons at Chicago, Illinois, and Boston, Massachusetts, and of the green peppers at Indianapolis, Indiana.

The trial was to a jury and resulted in judgment in favor of plaintiff on all four counts contained in the petition, from which judgment Missouri Pacific Railroad Company has prosecuted this appeal.

Appellee's petition contained four separate counts, and each of these counts, in effect, is a separate lawsuit. The first count relates to 640 crates of honeydew melons, loaded in Car ART 35042; the second relates to 640 crates of honey dew melons, loaded in Car ART 33450; the third relates to 560 crates of honeydew melons, loaded in Car ART 51395; and Count IV relates to 700 baskets of green peppers, loaded in Car ART 52223.

The cause was submitted to the jury upon nine special issues as to each count in the petition, and these issues are very similar as to each of the four counts. They vary only as to the peculiar facts of each count.

Appellant's Point Number One is as follows:

"Judgment should have been rendered in favor of the Carrier on Count I of the petition because:

- (a) The jury finding on Special Issue Number Three [fol. 441] establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss.
- (b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the

shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.

- (c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.
- (d) At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

The jury found, in answer to Special Issue No. 1, that the honeydew melons referred to in Court I were in such [fol. 442] condition at the time the bill of lading was signed that, based upon the orders given by the shipper to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition.

In answer to Special Issue No. 2, the jury found that such melons were in worse condition than would reasonably have been anticipated, based upon the condition in which they were at the time the bill of lading was signed, the orders given by the shipper to the carrier for their transportation and reasonable performance of those orders by the carrier.

Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 20 (11), which provides in part as follows:

"Any common carrier, railroad, * * * receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered * * *."

and under the evidence and findings of the jury, the shipper made out a prima facie case of liability against the carrier. 13 C.J.S. 131, § 71; *Panhandle & S. F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri-Kansas-Texas R. Co. v. Noble*, 271 S.W. 2d 146; *Rogers v. Crespi & Co.*, 259 S.W. 2d 928; *Railway Exp. Agency v. Hueber*, 191 S.W. 2d 710; *Panhandle & S.F. R. Co. v. Wilson*, 135 S.W. 2d 1062.

It is the contention of the shipper that the carrier can only defend against this prima facie cause of action by showing that the damages were due to one or more of the excepted causes at common law; viz., (1) an act of God, (2) the public enemy, (3) the act of the shipper, (4) the inherent nature of the goods themselves.

The jury found, in answer to Special Issue No. 3, that as to the honeydew melons described in Count I, the carrier performed without negligence the transportation services as provided by the terms and conditions of the bill of lading [fol. 448] and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions.

In answer to Special Issue No. 4, the jury found that as to the honeydew melons described in Count I, the worsened condition on arrival was not caused by the failure of the carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading.

The jury further found, in answer to Special Issue No. 5, that the worsened condition of the melons on arrival was not in any part caused by the failure of the carrier to transport and care for the melons in a reasonably prudent manner as to all matters not covered by shipper's instructions and the bill of lading:

In answer to Special Issue No. 6, the jury found that the worsened condition of the honeydew melons referred to in Count I, at the time of their delivery at destination, was not due solely to an inherent vice existing at the time the melons were received by the carrier at Rio Grande City, Texas:

The jury further found, in answer to Special Issue No. 7, that the worsened condition of the melons at destination was not caused solely by the carrier carrying out the instructions given by the shipper to the carrier for handling this shipment.

In answer to Special Issues Nos. 8 and 9, the jury established the loss in market value of the melons due to the worsened condition at destination.

It is the contention of appellant carrier that the jury's answers to the Special Issues show that the carrier carried out the instructions of the shipper and was not otherwise negligent, and that this is a complete defense to the prima facie case established by the shipper. While it is the contention of appellee shipper that the only defense to the prima facie cause of action established by it is to show that the loss was due to one of the excepted causes set out above.

It is conceded by the parties that where an interstate shipment is involved, the liability of the carrier and the [fol. 444] measure of damages are determined by the Interstate Commerce Act and the decisions of the Courts of the United States, construing it. See *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315; *Missouri-Kansas-Texas R. Co. v. Noble*, supra.

There are a great many authorities discussing the question here presented, and we are of the opinion that, by the great weight of authorities, the contention of the appellee shipper is sustained. *Panhandle & S.F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri Pac. R. Co.*

v. Trautmann Bros., 301 S.W. 2d 240; Thompson v. Bob Tankersley Produce Co., 289 S.W. 2d 840; Thompson v. A. J. Tebbe & Sons Co., 341 S.W. 2d 627; Schnell v. The Vallescura, 79 L. ed. 373, 293 U.S. 296, 307; Lehigh Valley R. Co. v. State of Russia, 21 F. 2d 396; Compares de Vapores Inseo S.A. v. Missouri Pac. R. Co., 232 F. 2d 657; Reider v. Thompson, 116 F. Supp. 279; Secretary of Agriculture v. United States, 100 L. ed. 173, 350 U.S. 160; Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co., 264 F. 2d 791, cert. den., 4 L. ed. 2d 70; California Packing Corp. v. The Empire State, 180 Fed. Supp. 19; Southern-Plaza Empress, Inc. v. Neal Nerville, Jr., 233 F. 2d 504; U. S. v. Mississippi Valley Barge Line Co., 285 F. 2d 381; California Packing Corp. v. States Marine Corp. of Del., 187 F. Supp. 540; Interstate Commerce Act, Title 49 U.S.C.A., § 20 (11); 13 C.J.S. p. 131, § 71, p. 151, § 79. Tariff Rules Nos. 130 and 135, in no way affect the rules laid down in the above cited authorities. We refuse to follow Southern Pacific Co. v. Itule, 74 P. 2d 38, 115 A.L.R. 1268, wherein it is held that the carrier's liability with relation to the transportation of vegetables is the same as for livestock, because such holding is contrary to the above cited cases.

This brings us to a consideration of Count II of appellee's petition. Appellant's Point Number Two is as follows:

"Judgment should have been rendered in favor of the carrier on Count II of the petition because:

(a) There was no evidence, or, at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honey dew melons at origin.

[fol. 445] (b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

We sustain this point. The evidence is insufficient to support the finding of the jury that the melons were in good

condition at the point of origin. The shipper relied upon the recital in the bill of lading to the effect that the melons were in apparent good condition, and the testimony of John Fillpot. The recital in the bill of lading relates only as to the condition of the outside of the crates, and this rule is not changed even though honeydew melons are so crated that a part of each melon can be seen without opening the crates. *Hoover Motor Express Co. v. U.S.*, 262 F. 2d 832.

John Fillpot did not inspect the melons at point of origin. He was asked the direct question whether he could say that he saw "a single one of the melons involved in this case." He answered, "I cannot." He was in general charge of gassing and cooling the melons, but the man who actually did this work did not testify. There was no other testimony as to the condition of the melons at origin than the general statements by Fillpot. We reverse the judgment of the trial court on Count II.

Appellant's Point Number Three is as follows:

"Judgment should have been rendered in favor of the carrier on Count III of the petition because:

- (a) The jury finding on Special Issue Number One, establishing that the honeydew melons involved were not in good condition at origin, that is, they would not reasonably have been expected to arrive at destination in good merchantable condition, based upon the orders of the shipper and the reasonable performance of same by the carrier, prevented judgment for the shipper, where the shipper relied solely upon a prima facie case."

[fol. 446] The finding of the jury on Special Issue No. 1, on Count III, precluded any recovery by the shipper on Count III. *Missouri Pacific R. Co. v. Trautmann Bros.*, 301 S.W. 2d 240; *Thompson v. Bob Tankersley Produce Co.*, 289 S.W. 2d 840; *Albers Milling Company v. Hauptman*, 95 F. 2d 286.

Appellant's Point Number Four is as follows:

"Judgment should have been rendered in favor of the carrier on County IV of the petition because:

- (a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.
- (b) The jury award is excessive."

We sustain this point. Appellee in attempting to establish the market value of the peppers relied entirely upon the testimony of Ed Baker. There were no United States Department of Agriculture Market Reports introduced in evidence as to the peppers, and there were no other market reports introduced. Baker admitted that he did not know the market price of U. S. No. 1 peppers on January 26, 1958, in Indianapolis. He based his opinion as to the market value of these peppers upon the account of sales showing that some of them sold for the sum of \$4.00 per basket. In the recent case of *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315, the Austin Court, speaking through Associate Justice Richards, had this to say:

"It is a general rule of law that an account of sales alone is incompetent to establish the reasonable cash market value of a shipment in the condition and on the date of its arrival. *Rio Grande & E.P. R. Co. v. T.A. Austin*, supra; *Thompson v. A. J. Tebbe & Sons Co.*, Tex.Civ.App., 241 S.W. 2d 627, 632; *Reider v. Thompson* (U.S.C.A. 5th) 197 F. 2d 158, 160."

Appellee's motion for a rehearing will be overruled, and appellant's motion for a rehearing will be granted in part and overruled in part in keeping with this opinion. [fol. 447] Our judgment heretofore rendered herein is set aside and judgment entered in accordance with this opinion; i.e., the judgment of the trial court is affirmed as to Count I, and reversed and remanded as to Counts II, III and IV. The costs of this appeal are taxed one-fourth against appellant and three-fourths against appellee.

W. O. Murray, Chief Justice.

[fol. 448] [File endorsement omitted]

[fol. 449]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

ELMORE & STAHL, Appellees.

Appealed from the 107th District Court of Cameron County.

JUDGMENT—September 12, 1962

The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

This cause came on to be heard on the transcript of the record, and the same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

It is further ordered that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs of this Court in this behalf expended and incurred, and this decision be certified below for observance.

[fol. 450]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
No. 13937

MISSOURI PACIFIC RAILROAD Co., Appellant,

vs.

ELMORE & STAHL, Appellees.

From Cameron County.

ORDERS OVERRULING MOTIONS FOR REHEARING—
October 10th, 1962

The motion of Appellees for rehearing, filed September 26, 1962, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that Appellees, Elmore & Stahl, pay all costs of this motion.

No. 13937

From Cameron County.

MISSOURI PACIFIC RAILROAD Co., Appellant,

vs.

ELMORE & STAHL, Appellees.

The second motion of Appellant for Rehearing, including motion for findings of fact and conclusions of law,

filed September 27, 1962, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay all costs of this motion.

Clérk's Certificate to foregoing papers (omitted in printing).

[fol. 451]

IN THE SUPREME COURT OF TEXAS

No. A-9323

From Cameron County

Fourth District

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

v.

ELMORE & STAHL, Respondent.

OPINION—May 15, 1963

On the only question presented by this appeal, we hold that after a shipper of inanimate perishables by common carrier railroad in interstate commerce has made a prima facie case of carrier liability, the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law.

Elmore & Stahl, respondent, brought this suit against Missouri Pacific Railroad Company, petitioner, to recover for alleged damage to three shipments of honeydew melons and one shipment of green peppers. The petition contains four separate counts, each relating to one of the shipments. Trial was to a jury and resulted in judgment on the verdict in respondent's favor on all four counts. The Court of Civil Appeals affirmed the judgment of the trial court as to

Count I, but reversed such judgment and remanded the cause as to Counts II, III, and IV. 360 S. W. 2d 839.

We are concerned here only with Count I. Respondent sought thereby to recover for damage to 640 crates of honeydew melons shipped in Car ART 35042 from Rio Grande City, Texas, to Chicago, Illinois. In response to the [fol. 452] first three special issues, the jury found: (1) that at the time the bill of lading was signed the melons were in such condition that, based upon the orders given by the shipper to the carrier and the reasonable performance of such orders by the latter, they would have been reasonably expected to arrive at destination in good merchantable condition; (2) that upon arrival at destination the melons were in a worse condition than would reasonably have been anticipated on the basis of their condition at the time the bill of lading was signed, the orders given by the shipper to the carrier, and the reasonable performance of such orders by the carrier; and (3) that petitioner and its connecting carriers performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by such bill of lading or instructions. The jury refused to find that the condition of the melons upon arrival in Chicago was due solely to inherent vice or to the carrying out of respondent's instructions for handling the shipment. "Inherent vice" as defined in the charge included "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time."

Under the general common law rule, a shipper of goods by common carrier makes a prima facie case of carrier liability by showing that the shipment was in good condition when delivered to the carrier at place of origin and in damaged condition when delivered by the carrier at destination. The carrier may then escape responsibility for the damage only by showing that it was caused solely by one or more of four excepted perils: (1) an act of God; (2) the public enemy; (3) the fault of the shipper, or (4) the inherent nature of the goods themselves. Where the loss is [fol. 453] not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent. See *Commodity Credit Corporation v. Nor-*

ton, 3rd Cir., 167 F. 2d 161; 13 C.J.S. Carriers § 71, p. 131. Some courts have held, however, that the general rule does not apply to shipments of livestock, and that the carrier may escape liability for damage thereto by showing the absence of negligence on its part. See *Panhandle & S. F. Ry. Co. v. Wilson*, Tex.Civ.App., 135 S.W.2d 1062 (wr. dis.).

No attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above. It argues that carrier liability for damage to an interstate shipment of inanimate perishables is determined by the rule applicable to livestock, and that it has been exonerated by the jury's finding in response to Special Issue No. 3. Respondent insists and the Court of Civil Appeals held that the case is governed by the general common law rule. The judgment of the trial court was affirmed because petitioner did not bring itself within one of the recognized common law exceptions.

According to American Jurisprudence, no distinction is made in most jurisdictions "as respects the application of the common-law rule of liability for the safe transportation and delivery of inanimate property, on the basis of its nature or character as perishable or nonperishable. In some jurisdictions, however, it is held that the common-law rule of liability as an insurer does not apply in the case of perishable goods and that liability for the loss or injury thereof depends in all cases upon negligence." 9 Am. Jur. Carriers § 693, p. 841. See also Annotation, 115 A.L.R. 1274. Perhaps the leading authority supporting the latter [fol. 454] view is *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A.L.R. 1268. The rule there laid down was recognized as sound in *Texas & Pac. Ry. Co. v. Empacadora de Ciudad Juarez*, Tex. Civ. App., 309 S.W.2d 926 (wr.ref. n.r.e.): The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions.

The general common law rule of carrier liability has long been recognized and applied by the Federal courts. See *Galveston Wharf Co. v. Galveston, H. & S.A. Ry. Co.*, 285

U.S. 127, 76 L. Ed. 659, 52 S. Ct. 342; *Commodity Credit Corp. v. Norton*, supra; *Compania de Vapores Inco, S. A. v. Missouri Pacific R. Co.*, 5th Cir., 232 F. 2d 657; *Lehigh Valley R. Co. v. State of Russia*, 2nd Cir., 21 F. 2d 396; *Reider v. Thompson*, 113 F. Supp. 279. In *Schnell v. The Vallescura*, 293 U.S. 296, 79 L. Ed. 373, 55 S. Ct. 194, which was a suit in admiralty to recover for damage resulting from decay of a shipment of onions, the Supreme Court of the United States discussed the rule which requires the carrier to establish that the loss was due to some excepted peril, and said:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

Petitioner directs our attention to the provisions of the Carmack Amendment that any common carrier shall be liable "for any loss, damage, or injury . . . caused by it or by any common carrier . . . to which such property may [fol. 455] be delivered." 49 U. S. C. A. § 20(11). This statute does not alter or modify the basic common law rule of carrier liability with which we are here concerned. See *Cincinnati, N.O. & T.P. R. Co. v. Rankin*, 241 U.S. 319, 60 L. Ed. 1022, 36 S. Ct. 555; *Secretary of Agriculture v. United States*, 350 U.S. 162, 100 L. Ed. 173, 76 S. Ct. 244. Petitioner also relies on Rules 130 and 135 of the Perishable Protective Tariff No. 17, which are quoted in the margin,¹ and has cited a number of cases where the courts

¹ "RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such

have said that these rules operate to limit the carrier's liability.

The reasoning of the courts in some cases is obscured by declarations that the carrier is or is not an insurer, and by statements indicating that the shipper, by establishing delivery to the carrier in good condition and receipt at destination in damaged condition, makes out a prima facie case of negligence on the part of the carrier. Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. And as pointed [fol. 456] out in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659, 46 S. Ct. 318, the so-called presumption of negligence is not a presumption at all but is a rule of substantive law under which the carrier is liable for failure to transport safely unless the loss or damage is due to one of the specified causes.

As we construe Rules 130 and 135, they simply provide that by furnishing protective services the carrier does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, and will not be responsible, in the absence of negligence, for damage due to the fault of the shipper or the inherent nature of the goods themselves. The cases upon which petitioner relies do not hold otherwise. For example, specific acts of negligence were alleged by the plaintiff in *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 5th Cir., 164 F. 2d 1, and it was held that

deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"RULE 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

proof of compliance with the shipper's instructions constituted a defense to the allegations of negligence in the furnishing of protective services. In *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 6th Cir., 188 F. 2d 343, the shipper failed to establish that the fruit was in good condition when delivered to the carrier. While the Court of Appeals for the Fifth Circuit has observed that damage resulting from breakage of crates is different from spoilage due to inherent vice, it did not say that the carrier may exonerate itself without establishing that the case falls within the latter exception. See *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 5th Cir., 263 F. 2d 791. In considering whether the shipper had shown negligence on the part of the carrier in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, *supra*, the court was concerned only with the right [fol. 457] of the plaintiff to maintain suit without having given prior written notice of the claim. The applicable statute provided that such notice would not be required if the goods were damaged in transit by carelessness or negligence.

The concluding portion of the opinion in *Trautmann Bros. v. Missouri Pac. R. Co.*, 5th Cir., 312 F. 2d 102, seems to support petitioner's position, but the entire opinion must be read in the light of the trial court's findings. The shipper there prepared the car by using electric fans and thus melted ice which was required for refrigeration. The carrier was not notified of this action, with the result that the ice supply was not replenished, and many of the melons were found to be overripe and spoiled when they were unloaded at destination. Under these circumstances the trier of fact could well conclude, as he did, that the overripe condition of the melons was caused by excepted perils, i.e., the inherent nature of the perishables and the failure of the shipper to notify the carrier of the manner in which the car was prepared. Although the Court of Appeals referred to the *Itule* case in a footnote, its decision appears to be simply another application of the rule, as stated in the opinion, that "so long as the carrier has discharged its duty of reasonable care, it is * * * not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves" or "for damages caused solely by the acts or directions of the shipper."

The so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables. We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates. [fol. 458] Petitioner apparently recognizes that the rule it urges us to adopt would not be applicable where the carrier had failed to deliver a shipment of perishables, or in case of bruising, crate breakage or damage by fire. It seems to be saying that when the claim is for spoilage or decay, the carrier should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree.

Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. The shipment in the present case was made under a Uniform Straight Bill of Lading which, unlike the Uniform Live Stock Contract prescribed by the Interstate Commerce Commission, states that the carrier shall be liable as at common law except as therein provided. The bill of lading then stipulates that the carrier shall not be liable for loss or damage caused by certain excepted perils, but there is no provision exempting it from liability for damage to perishables not caused by its own negligence. From a consideration of the terms of the bill of lading and the general common law rule as recognized and applied by the Federal courts, it seems clear to us that the Court of Civil Appeals properly refused to follow the *Itule* case. A common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, but petitioner has not established that the damage in this case was caused solely by natural deterioration.

The judgment of the Court of Civil Appeals is affirmed.

Ruel C. Walker, Associate Justice.

Opinion delivered: May 15, 1963.

[fol. 459] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 460]

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.,

vs.

ELMORE & STAHL.

From Cameron County, Fourth District.

JUDGMENT—May 15, 1963

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals, as follows:

"The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

"This cause came on to be heard on the transcript of the record, and same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

"But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

"It is further ordered, that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs in this Court in this behalf expended and incurred, and that this decision be certified below for observance."

it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and is hereby, affirmed, in accordance with the opinion herein this day delivered.

"It is further ordered that the costs expended and incurred in this cause in the Court of Civil Appeals remain as assessed by the judgment of that Court and that petitioner, Missouri Pacific Railroad Company, and the surety on its cost bond on appeal, Fidelity and Deposit Company of Maryland, pay all costs in this cause expended and incurred in this Court, and that this decision, with a copy of the opinion herein this day delivered, be certified to the District Court of Cameron County, Texas, for observance.

[fol. 461] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 462]

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.,

VS.

ELMORE & STAHL.

From Cameron County, Fourth District.

ORDER OVERRULING MOTION FOR REHEARING—June 12, 1963

Motion of petitioner for rehearing, filed in above numbered and entitled cause on May 30, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol: 463]

SUPREME COURT OF THE UNITED STATES

No. 292—October Term, 1963

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

VS.

ELMORE & STAHL.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.